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JOHN T. FEY, Clerk

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1956

No. 691

MARY EDITH DAULTON, Administratrix of the Estate of Donald LeRoy Daulton, deceased,

Petitioner,

vs.

SOUTHERN PACIFIC COMPANY, a corporation,

Respondent.

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

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PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals for the Ninth Circuit.

Petitioner Mary Edith Daulton, Administratrix of the Estate of Donald LeRoy Daulton, deceased, prays that a Writ of Certiorari issue to review the opinion and judgment of the United States Court of Appeals, reported in 217 Fed. 2d 710, appended hereto as Appendix "A", together with the certified record.

JURISDICTION.

The judgment of the United States Court of Appeals was made and entered on October 15, 1956. There was no petition or order for rehearing and there was no order granting an extension of time within which to petition for certiorari. The statutory provisions believed to confer on this Court jurisdiction to review the judgment in question by Writ of Certiorari are 28 U.S.C. 2101 and 28 U.S.C. 2106; and Rule 19.1 (b) Rules of the Supreme Court.

QUESTIONS PRESENTED FOR REVIEW.

Did the trial judge prevent the plaintiff from having a fair trail, and violate the "due process" provision of the Fifth Amendment to the United States Constitution, when he arbitrarily refused plaintiff's counsel the right to present to the jury, by argument, the law applicable to the facts that would support the contentions of the plaintiff?

Does a trial judge violate the provisions of the Fifth Amendment to the Constitution when he deprives the plaintiff of the benefit of testimony of an expert witness by distorting and discrediting that testimony?

Does a plaintiff have a fair trial and the full benefit of the "due process" provision of the Fifth Amendment to the Constitution of the United States, when counsel is arbitrarily forced to either erroneously state the law or not state it at all?

Did the rulings of the trial judge deprive the plaintiff of her right to have her case and cause fully and effectively presented by counsel, in violation of the "due process" provision of the Fifth Amendment to the United States Constitution?

STATUTES INVOLVED.

This case involves the Fifth Amendment to the Constitution of the United States.

> "No person shall . . . be deprived of life, liberty, or property without due process of law; . . ."
> *Constitution, U.S.C.*

STATEMENT OF THE CASE.

This action was filed in the United States District Court for the District of Oregon, under the provisions of the Federal Employers' Liability Act, 45 U.S.C.A. 51 et seq. to recover damages for the death of Donald LeRoy Daulton, allegedly caused by the negligence of the defendant.

The deceased, while engaged in his work as a brakeman on the 6th day of October, 1952, suffered injuries which caused his death, under the following circumstances.

The deceased was engaged in his work on a work train at a point about one mile south of Wocus, Oregon (P.R. 46).[1] The train was moving north toward

[1]Refers to printed record page.

Wocus for the purpose of proceeding into a siding (P.R. 47). There were welders working alongside of the track that the train would have to pass (P.R. 46). The deceased had the duty of aligning the switch so the train could enter the siding (P.R. 48). He was on the right front footboard of the engine as the train moved toward the switch. The conductor or engineer was in charge of telling the men where to ride (P.R. 51). When the train was about forty car lengths from the switch deceased went out of the sight of the engineer (P.R. 116). All witnesses except the engineer and the superintendent of the Southern Pacific testified that according to custom and practice the train should have been stopped immediately when deceased went out of view of the engineer, but the move continued until the train was stopped one or two car lengths south from the switch (P.R. 124). Deceased was found under the front trucks of the engine tender (P.R. 49), and his personal effects and marks of being dragged extended south approximately one hundred feet (P.R. 49). The train could have been stopped in from ten to fifteen feet (P.R. 51).

There were no witnesses to what actually happened on the front end of the engine.

REASONS FOR ALLOWANCE OF WRIT.

Counsel for plaintiff, before argument to the jury, asked the trial judge if it would be permissible to refer to instructions that might be given so as to conform the facts to the law so that an intelligent

presentation could be made showing that the plaintiff under the law as applied to the facts should be entitled to a recovery. The Court not only refused such permission but denied counsel any right to argue the law.

"Mr. Brobst. There was one other point, and that is this: In argument sometimes I like to refer to the instructions that will be given, and ask the jury to listen for them, to bring out and emphasize a point.

The Court. I would not suggest taking any chance on doing that here.

Mr. Brobst. I don't want to get up and say—

The Court. Not only that, *but I have a personal custom, which all judges do not follow, and that is that I do not permit you to argue the law or to say that I am going to give an instruction,* because I think that gives undue emphasis to the particular point that is being brought out, and the other side can get up and say that I am going to say just absolutely the contrary. I might give something in between. As a matter of fact I usually don't know what I am going to say to a jury——

Mr. Brobst: I am confronted with that problem myself when I get up to argue sometimes. This other point: I may explain the Act to them, the way it operates, that he was not covered by State compensation, and that the only recovery is under this Act?

The Court. You will have to leave that to me." (P.R. 114, 115).

After these remarks by the Judge, counsel stated that the Court was taking away all of his argument.

"Mr. Brobst. That is what I want to know. You are taking (86) all my arguments away from me." (P.R. 115).

Denying counsel the right to present the facts to the jury in the light of the applicable law, is contrary to the law.

"In the trial of cases to a jury in the federal courts, the arguments of counsel must be confined to the issues of the case, *the applicable law,* (emphasis added) the pertinent evidence, and such legitimate inferences as may properly be drawn therefrom."

London Guarantee & Accident Co. v. Woelfle, 83 Fed. 2d 325;

Chicago & N.W. Ry. Co. v. Kelly, 84 Fed. 2d 569.

"Nor is there any merit in the contention that counsel for plaintiff was permitted to make improper argument to the jury when after discussing some of the evidence he said: 'I think the Court will instruct you as to the law.' Objection was then made, and the argument is that counsel should not be permitted to tell the jury what the Court would instruct them as to the law. It is entirely proper for counsel to say in his argument that he thinks the Court will instruct the jury—stating the law which he thinks the Court will give."

Nuins v. Mutual Ben. Health Co. Accident Assn. 319 Ill. App. 239, 48 N.E. 2d 796.

"Although an attorney in his argument to the jury may state the principles of law applicable

to the action so far as it is necessary to enable him to discuss the evidence intelligently . . ."

Mokina v. Spokane, P. & S. Ry. Co., 155 Ore. 317, 63 Pac. 2d 1082, 1089.

"That counsel may in his argument, state what the law is and apply the law to the facts in the case is well established in California, provided of course, the statement of what he considers to be the law is correct."

People v. Dykes, 107 Cal. App. 107, 118;

De Armos v. Dickerman, 108 Cal. App. 2d 548, 239 Pac. 2d 65.

"Counsel have the right to argue 'the whole case as well of law as of fact' G.S. Sec. 84-14; Howard v. Western Union Telegraph Co., 170 N.C. 495, 87 S.E. 313. Frequently it is necessary for them to do so in order to present, in an intelligent manner, the facts they contend the jury should find from the evidence offered. Sears Roebuck & Co. v. Rouse Banking Co., 191 N.C. 500, 132 S.E. 468."

Brown v. Vesbal, 55 S.E. 2d 797.

See, also

Belkley v. Thompson, 211 S.W. 2d 83.

In north Carolina the right to argue the law and the facts is a statutory one.

". . . in jury trials the whole case as well of law as of fact may be argued to the jury."

Conn. v. Seaboard Airline R. Co., 201 N.C. 157, 159 S.E. 331.

The rule is well stated in Abbott's Jury Trials, Fifth Ed. p. 769, Sec. 352, Subd. h:

> "Counsel has the right to state his views of the law to the jury by way of argument of the question of fact to be submitted to them . . ."

And

> "It is elementary law that counsel in argument may comment on the instructions."
> *Rhomberg v. Israel,* 296 S.W. 860.

The witness, Zimmerman, was called by the plaintiff to testify to the stopping distance of a train composed of the same type of cars as the train involved in the accident. He was a switchman employed by the defendant and had been so employed for eighteen years.

> "Q. Mr. Zimmerman, what is your business or occupation, please?
> A. I am a switchman for the Southern Pacific Company.
> Q. How long have you been employed by the Southern Pacific Company?
> A. Eighteen years." (P.R. page 75).

He had been a helper on switch crews and he had been an engine foreman and had worked two months as a brakeman.

> "Q. What types of work have you done generally?
> A. Helper on switch crews and engine foreman, and two months as brakeman." (P.R. page 77).

After this qualification he was asked in what distance the movement of an engine, two K and J cars, a ditcher, and a caboose traveling at two to four miles an hour could have stopped (P.R. page 77).

The Court sustained an objection and stated:

> "I think that is correct. I don't think he has had any experience to qualify him to answer." (P.R. 78).

The same general question was again asked (P.R. page 78) and over objection the Court permitted him to answer but, in so doing, completely discredited his answer by the following statement:

> "He has worked around trains. It is a question for the jury. Ladies and Gentlemen of the jury, I think that this witness has shown no particular qualifications, anymore than you or I would have about this, but he has seen trains in operation, perhaps . . ." (P.R. page 78).

There is no question but what he was far better qualified than the jurors who were ordinary laymen.

See:

Peters v. Southern Pacific Co., 160 Cal. 48, 116 Pac. 400;

Newkirk v. Los Angeles, 21 Cal. 2d 308, 131 Pac. 2d 535.

In the above cases the Court clearly states that the management and operation of trains is a matter out-

side the experience and knowledge of ordinary jurors. This witness was amply qualified as an expert.

Weinsatts, Adm. v. L. & N., 31 S.W. 2d 734;
Chicago Great Western v. Beecher, 150 Fed. 2d 394;
Byrd v. Va. Railroad, 13 S.E. 2d 273.

It has been held prejudicial error to distort and discredit the testimony of a witness as the Trial Court did here.

> "As we stated in *Quercia v. United States,* 289 U.S. 466, 469, 53 Supreme Court 698, 699, 77 L. Ed. 1321:
>
> 'This privilege of the judge to comment on the facts has its inherent limitations. His discretion is not arbitrary and uncontrolled, but judicial, to be exercised in conformity with the standards governing the judicial office. In commenting upon testimony he may not assume the role of a witness. He may analyze and dissect the evidence, but he may not either distort it or add to it.'"
>
> *Cal-Bay Corp. v. United States,* 169 Fed. 2d 15, 21.

After the trial judge had rejected all requested instructions the question of measure of damages was discussed, and although that question evidently was never reached by the jury, this discussion shows clearly the arbitrary position taken by the trial Court, in the Court's erroneous view of the measure of damages. That view restricted counsel in his argument, and although consented to by the defendant, it denied

counsel for plaintiff the right to correctly argue damages.

(See Appendix "B" for discussion.)

Counsel was attempting to have the Court instruct the jury in accordance with the law established by this Court that:

> "The true measure of recovery is the present cash value of future benefits of which the beneficiaries were deprived by the death, making adequate allowance according to the circumstances for the earning power of money."
>
> *Chesapeake R.R. v. Kelly*, 241 U.S. 495, 60 L. Ed. 1117.

That is the proper measure of damages under the Federal Employers' Liability Act, 45 U.S.C. 51 et seq.

The Court stated that no instruction would be given on the present cash value of future benefits, or the earning power of money, and thus counsel was either to argue erroneously or not at all.

If counsel and Court cannot be guided by the decisions of the United States Supreme Court, then what can be the guide? The trial Court in taking this arbitrary stand stated:

> "If the Supreme Court doesn't like my comments on this thing, I would be very glad if they would reverse it." (P.R. p. 155, see Appendix "B".)

Certainly the trial judge by erroneously taking away argument of counsel, denied to plaintiff the right to be fully heard and effectively represented by coun-

sel, a direct violation of the constitutional right of the plaintiff under the "due process of law" provision of the Fifth Amendment to the United States Constitution.

In any case, civil or criminal, the right of a party to be represented by counsel is unquestioned.

> "In civil cases as well as in criminal cases, the right of a party to be represented by counsel before the court upon the law and before the jury as to facts at all stages of the trial is not to be questioned."
>
> 53 *Amer. Juris.* 43 Sec. 25.

See, also,

Powell v. Alabama, (infra).

This right to be represented by counsel means effective representation, otherwise there is a denial of "due process of law."

> ". . . under the Sixth Amendment and the due process clause of the Fifth Amendment the assistance of counsel means effective assistance." *Neufield v. United States,* 118 Fed. 2d 375.

And, under comparable circumstances, where the trial Court refused to hear argument of counsel, as compared to the facts here where the trial judge erroneously prevented argument to the jury, it was held that effective assistance of counsel was forbidden.

> ". . . *in the denial of the right to argue the case* (italics added) there being no written briefs below, were forbidden the effective assistance of counsel."
>
> *Thomas v. District of Columbia,* 90 Fed. 2d 424.

The attitude of the trial judge constitutes a refusal to hear the plaintiff by counsel, as his argument had been taken away by the erroneous ruling of the Court, and this constituted a denial of "due process".

> "The arbitrary refusal of any court, state or federal, to hear a party by counsel employed by and appearing for him would be a denial of a hearing and in a constitutional sense a denial of due process."
>
> 53 *Amer. Juris.* 43 Sec. 25.

> "If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore of due process in the constitutional sense."
>
> *Powell v. Alabama,* 287 U.S. 45, 77 L. Ed. 78, 53 Sup. Ct. 55, 84 A.L.R. 527;
>
> *Roberts v. Anderson,* 66 Fed. 2d 874 at 877.

The plaintiff could not be and was not fully represented by counsel, as was his right, because of the limitations placed upon counsel by the erroneous attitude of the trial judge. This right cannot be unduly impinged.

> "While a party has a constitutional right to be represented by counsel, and that right cannot be unduly impinged . . ."
>
> *Loreno v. Ross,* 133 So. 251, 222 Ala. 567.

To be fully represented is an integral part of "due process."

> ". . . It must be kept in mind by those who preside over our Courts that just as in criminal

> cases it is the constitutional right of every accused 'to be heard by himself and counsel', so likewise in civil cases, a litigant's right to be fully represented by counsel is an integral part of that 'due process of law' which every resident of this state and nation whose legal rights are being adjudicated can freely invoke."
>
> *Nestor v. George,* 46 A. 2d 469 at 473 (Penn.).

By the erroneous rulings of the trial judge plaintiff was denied the right to be effectively represented by counsel. Counsel's lips were sealed as far as adequately and intelligently presenting his client's case to the jury, thus depriving plaintiff of a full representation and a fair trial and hearing.

It is submitted that the writ of this Court should issue to review the decision below, for it is contrary to the fundamental law of the land entitling a litigant to full and effective representation by counsel, in accordance with the constitutional right of "due process of law", and this right should not be impinged or denied by the arbitrary and erroneous rulings of the trial Court.

Dated, Oakland, California,
January 10, 1957.

CLIFTON HILDEBRAND,
Attorney for Petitioner.

D. W. BROBST,
Of Counsel.

(Appendices A and B Follow.)

Appendix A

United States Court of Appeals
For the Ninth Circuit

MARY EDITH DAULTON, Administratrix of the Estate of Donald LeRoy Daulton, deceased, *Petitioner,* vs. SOUTHERN PACIFIC COMPANY, a corporation, *Respondent.*	No. 14,924 Oct. 15, 1956

Appeal from the United States District Court
for the District of Oregon

Before: MATHEWS, BONE and CHAMBERS, Circuit Judges. CHAMBERS, Circuit Judge:

Donald LeRoy Daulton, a Southern Pacific brakeman of the Shasta division of the company, was killed on October 6, 1952, in the course of his employment near the Wocus siding, which is located about three miles from Klamath Falls, Oregon.

In the moments immediately preceding his death he was acting as the "head" or "front end" brakeman on a five car work train. The train was moving northerly on a main line track to get on a siding and

out of the way of two freight trains that were scheduled to pass each other at Wocus. As the train moved slowly forward at perhaps four miles an hour Daulton was standing on the right hand footboard (engineer's side).[1] Before entering the siding, the train was to stop for Daulton to manually throw the switch to permit entry into the siding.

Obviously, from the testimony of various trainmen, it would have been better practice for Daulton to have ridden in the cab of the engine, but on the other hand, he may have been riding the footboard to watch for tools possibly left on the track by workers and to warn the workers, as he saw them, about the other trains which would be along soon.

There were no eye witnesses. No one knows positively what caused Daulton to fall off the footboard and to be dragged between the rails and killed. It is not suggested that it was due to a sudden lurch forward or a quick stop of the engine. As the train moved forward, Daulton was at first visible to the engineer. Then he did not observe Daulton out on the footboard for a distance of "about 40 car lengths" or about 1,400 feet. Being almost at the juncture to the sidetrack, and seeing the switch for the sidetrack receiving no attention and that the block signal near the switch had not changed over, the engineer stopped the train. Now, at this point, all of the train crew

[1]In lay par lance, the front end of the engine had sort of a single step in either side of the "cow catcher," called the right hand and left hand footboards. These are for a brakeman to stand on when necessary or convenient for him to do so, particularly in connection with switching.

knew something was wrong. The testimony indicates the train probably could have been stopped within ten feet. It is not clear whether the engineer lost sight of Daulton because he, the engineer, was primarily watching a signal or because Daulton was no longer on the footboard to be seen, but somewhere under the engine or tender. At least for much of the way, the jury could have found that Daulton could not have been seen on the footboard—because he wasn't there.

Daulton's administratrix on two theories brought her action against Southern Pacific for his death. The first theory was under the so-called Boiler Act[2] and claimed that the death was due to a protruding bolt on the right hand footboard which had not been countersunk, as good practice would require. In such an event contributory negligence of the decedent would not have been a defense or result in any diminution of damages.

The other claim was under the Federal Employers Liability Act.[3] This claim asserted negligent operation of the train caused the death. Absence of negligence by the defendant and sole neligence and contributory negligence of the decedent were pleaded by Southern Pacific. During the trial a pre-trial order was completed, setting forth the contentions of the parties. It concluded with defining the issues as follows:

---

[2]See 45 U.S.C.A. § 23, et seq.

[3]See 45 U.S.C.A. § 51, et seq.

"I.

"Was defendant's engine improper or unsafe in any of the particulars charged and, if so, was such a proximate cause of the death of the deceased?

II.

"Was the defendant guilty of negligence in any particular as charged and, if so, was such a proximate cause of the death of the deceased?

III.

"What is the amount of plaintiff's damage?"

The case was tried to a jury. In view of the usual verdict returned for the plaintiff in cases of this type, it is surprising that the jury in this case did return a verdict for the railroad company. But it did. Now the plaintiff appeals.

The plaintiff-appellant attacks in several ways the instructions given on contributory negligence. In proper time, the instructions on this subject were excepted to by the plaintiff's counsel in words as follows:

"There is only one, your Honor. That was the question of the instruction on contributory negligence. I believe under the circumstances, where the law conclusively presumes that the plaintiff was in the exercise of ordinary care, there being no evidence in the record to the contrary or that he did any act that could be construed as an act of contributory negligence, the instruction should not have been given."

Here both sides were represented by lawyers, experts in the field. It is particularly just[4] to apply Rule 51 of the Federal Rules of Procedure here and to hold that the only objection this court can consider in appellant's group of objections concerning contributory negligence is the one which asserts it was not appropriate to instruct the jury in the field at all because "the law conclusively presumes that the plaintiff was in the exercise of ordinary care, there being no evidence in the record to the contrary or that he did any act that could be construed as an act of contributory negligence."

Southern Pacific answers that the objection is of no moment anyway because a verdict by the jury in its favor necessarily means the company was guilty of no negligence; therefore, it matters not a whit whether any instruction was given on the subject or what the instruction said. That is, to say, in Federal Employers Liability cases contributory negligence mitigates damages by a certain percentage or fraction. If the defendant caused none of the damage, there is no legal damage. The reduction of nothing by a fraction is nothing. Therefore, error, if any, was harmless. So the argument goes.

However, a better ground to dispose of the point is to say that the objection as made and when made was not a good one. Of course, one starts with the presumption, in the absence of evidence, that every-

[4]The objections now made by appellant, but not discussed in this opinion, the court deems to be without merit.

one was careful. But the presumption is not conclusive.

The rules in these Boiler Act and Federal Employers Liability cases are extremely liberal. Tennant v. Peoria & Pekin Union R. Co., 321 U.S. 29. Usually the jury must decide. Here is a string of circumstances, no direct proof. Certainly one cannot say that there is strong proof pointing to any one solution as to how the death occurred. But there are several possible sequences to choose from that might have placed the blame upon the railroad. The jury was entitled to search for what to it seemed most probable as it reconstructed what happened. It could find the engineer on the train, and thus the company, to blame and liable, but it did not have to do so.

Surely the company on contributory negligence is entitled to have the same rules work in its favor. After exploring the testimony for an hypothesis to support plaintiff, and finding none, of course, nothing further was required. But suppose the jury had concluded that the engineer did not cause Daulton to fall off under the train, that Daulton probably did receive serious injuries when he fell off and under (but perhaps not fatal). Further, assume that the jury might find the railroad was negligent in not getting the train stopped, eliminating the distance he was dragged, and thus saving the life of Daulton. Then, this court would see no objection to a jury concluding that it must have been negligent riding by Daulton that got him under the engine in the first place. The jury could then say,

for example, the fault was one half Daulton's, and thus reduce the verdict by one half.

The lesson seems to be in Schultz v. Pennsylvania Roalroad Co., 350 U.S. 523, that the jury can choose any reasonable hypothesis and that the rule works both ways.

There are other assignments of error too. One of the major objections of the appellant is that the court in advance advised counsel that they couldn't predict to the jury what the instructions on the law would be. In common parlance, neither side was permitted "to argue the law" to the jury. But the great question here was what caused the accident. And how much were the damages. On a fair consideration of the record, it would not appear that the plaintiff was required to argue in a vacuum. It would appear that the trial court committed no error on this point.

On another point claimed as error, the record is against the plaintiff. At the threshold, the attorneys for the plaintiff seem to have made an error. It was an honest one. The right footboard on the engine when examined sometime the next day had the head of a bolt sticking up on the surface. It was not countersunk as it should have been. And this condition seems to have continued for months after the accident. Counsel for the administratrix arranged that the bolt extending up above the surface of the board was duly photographed. Upon this discovered condition, which misled them, they projected the claim that a piece of defective equipment caused the accident. If true, and

assuming causation, absolute liability under the Boiler Act would have resulted. But although the issue built upon this bolt did go to the jury, the railroad at the trial explained, and it is fair to say rather conclusively, that the morning after the accident the old footboard was removed after railroad representatives photographed it and before the plaintiff had seen it. The board was stored for possible future need as evidence in this, the case one could expect almost surely would be filed. Appellant claims that the circumstances of incidents in the case before trial were such that they were misled by the Southern Pacific on this footboard and that the company should have told her counsel in advance.

The point in this record might have some merit if it did not also appear that in the opening statement to the jury made by the defendant it was stated that the railroad would show that the footboard was changed immediately after the accident and that nothing was wrong with the board at the time the accident happened. Plaintiff made no request for a continuance at the time and did not complain. Under the particular circumstances here, all that plaintiff might have been entitled to was time. For this, no request was made. Complaint cannot be made now.

Finally, appellant says the court made prejudicial remarks to the jury concerning the testimony of a witness named Zimmerman when he gave his expert opinion as to the time required to stop the work train going at the slow speed which all admitted. It

is a close question whether the comment should or should not have been made at the time it was. But by the end of the case several witnesses were asked their opinions as to the distance required to stop the train. All fixed a very short distance. None suggested over fifteen feet.[5] Had the issue remained hotly contested as to the distance required to stop, then the comment might have to be seriously considered. But when the case was submitted to the jury, the comment had become of no consequence anyway.

Plaintiff had a fair trial.

Affirmed.

(Endorsed:) Opinion. Filed Oct. 15, 1956.
Paul P. O'Brien, Clerk.

[5]Zimmerman said "within a few feet, almost immediately." Others said (1) within 10 to 15 feet (2) in between four to six feet (3) six to eight feet.

United States Court of Appeals
For the Ninth Circuit

Mary Edith Daulton, Administratrix of the Estate of Donald LeRoy Daulton, deceased, *Appellant,* vs. Southern Pacific Company, a corporation, *Appellee.*	No. 14,924

JUDGMENT.

APPEAL from the United States District Court for the District of Oregon.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Oregon and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed, with costs in favor of the Appellee, and against the Appellant.

IT IS FURTHRER ORDERED and adjudged by this Court, that the Appellee recover against the Appellant for its costs herein expended and have execution therefor.

Filed and entered October 15, 1956.

Appendix B

"The Court. I don't find any difficulty with that. Now, then, as to this measure of damages, I think that I won't give any instruction with reference to the value of money because I think that is asking me to comment on the evidence.

Mr. Brobst. Yes. I wasn't the value of money——

The Court. The earning power of money. According to your Instruction 25, according to the circumstances, they (129) could make an allowance for the earning power of money.

Mr. Brobst. That is based on the actuarial table. Your Honor, the statute says that you are entitled only to the present cash value of the loss of future earnings. I think that is the requirement, and it is not a question of——

The Court. Just a moment. Do you agree to that?

Mr. Gearin. I don't recall the statute, your Honor.

The Court. Have we got the statute here?

Mr. Brobst. I have it in my hotel room. Here is my idea on that: I know the cases hold in death cases if you recover without your actuarial figures being in it will be reversed because that is not the true test of damages. They must make an allowance for the earning power of money, because it would be too high. I mean it is giving the defendant a break, because you invest your lump sum at a 3 per cent interest rate and it cuts down the lump sum to give this widow what she would anticipate per month——

The Court. It seems to me it enters into the field of speculation. What is your suggestion?

Mr. Gearin. Your Honor, I am trying to recall the instruction which your Honor has given in other cases under the F.E.L.A. My impression is that the instruction which your Honor has given, and to which I have never taken exception, is the loss of pecuniary benefits.

Mr. Brobst. It is the present cash value, I think, is (130) the test. We have run into that in other cases which we have had to retry because of it. It works to the benefit of the defendant, because it cuts down.

The Court. That is what I am trying to get at here. I think it is a minor and immaterial instruction myself because of the fact that I don't think the jury pays a bit of attention to that sort of an instruction. But in order to avoid error I would be pleased if counsel would indicate an instruction that they could agree on.

Mr. Brobst. Your Honor, I think the Guthrie case and that other United States Supreme Court case that I cited in my trial brief states the rule pretty thoroughly, and it is one that we have followed ever since that Guthrie decision in San Francisco.

The Court. Yes, but the Guthrie case has a lot of implications besides that. The Guthrie case didn't arise in this sort of action.

Mr. Gearin. The measure of recovery is the pecuniary benefits reasonably to have been anticipated, benefits of which they have been deprived as a result of the employe's death, such damages being such pecuniary assistance or support as they might reasonably have expected to receive had the employe lived.

The Court. That clause is included in your Instruction No. 27, Plaintiff's 27. (131)

Mr. Gearin. That was my thought, percuniary benefits.

The Court. And also No. 26.

Mr. Brobst. I don't want it to bé raised afterwards that it was error because it was not the present cash value. That is the thing——

Mr. Gearin. We won't raise that question, your Honor.

Mr. Brobst. That is the thing that concerns me most.

Mr. Gearin. I assure you we won't raise that in this court or any other court.

The Court. With the consent of the defendant, the Court will refuse to give Plaintiff's Instruction 25.

Mr. Gearin. I don't know whether the record is complete. We agree to the withdrawal of the request. We will raise no point on the Court's failure to give it.

The Court. I will make it with the consent of the defendant in that regard. I have the consent of the defendant, so I won't ask for the consent of the plaintiff.

Mr. Brobst. Here is the case. It says: 'The true measure of recovery is the present cash value of future benefits of which the beneficiaries were deprived by the death, making adequate allowance according to the circumstances for the earning power of money,' citing Chesapeake Railroad v. Kelley, 241 U.S. 495.

The Court. I don't think that is anything the Supreme Court has the power to control me on,

whether I give an instruction (132) in that regard or not. I think myself it is a comment on the evidence. If the Supreme Court wants to take a different view of it, that is all right, but I think it is a comment on the evidence. I think what they have to consider is adequate compensation for the injury. I think they can take into consideration the earning power of money, and so forth and so on, but I don't think I have to tell them they are going to.

Mr. Brobst. Here was the thing, your Honor, that concerned me about it. The Supreme Court said: 'So far as a verdict is based upon the deprivation of future benefits, it will afford more than compensation if it be made up by aggregating the benefits without taking account of the earning power of the money that is presently to be awarded. It is self-evident that a given sum of money in hand is worth more than a like sum of money payable in the future.' That was the thing that I was afraid of. It raises a question in my mind. Of course, if they waive the error, I don't mind, actually, because the plaintiff has a better break——

Mr. Gearin. Don't worry about me.

The Court. As a matter of fact, I have sat long enough on the Federal Court so that if I thought it was more than adequate I would set it aside.

Mr. Brobst. That is right.

The Court. But if I am satisfied with it, then I am perfectly willing to let the Supreme Court say I was wrong in not giving the instruction. But the defendant has waived that, so I don't see any danger

in it anyhow. Besides, I think it gives them a problem that they are not equipped to handle. That is my notion about it. If I tell the jury what the present value of money means, they are not going to pay any attention to that. If the Supreme Court doesn't like my comments on this thing, I would be very glad if they would reverse it. The thing is chiefly whether I am satisfied with the verdict."

No. 14924

United States
Court of Appeals
for the Ninth Circuit

MARY EDITH DAULTON, Administratrix of the Estate of Donald LeRoy Daulton, deceased,
Appellant,

vs.

SOUTHERN PACIFIC COMPANY, a corporation,
Appellee.

Transcript of Record

Appeal from the United States District Court for the District of Oregon

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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For Appellee.

In the District Court of the United States, Northern District of California, Southern Division

No. 33623

AGNES B. THOMPSON, Administratrix of the Estate of DONALD L. DAULTON, deceased,
Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, a corporation,
Defendant.

COMPLAINT FOR DAMAGES AND DEMAND FOR JURY

Plaintiff complains of defendant and for cause of action alleges:

I.

That heretofore and on the 19th day of February, 1954, by an order of the Superior Court of the State of California, in and for the County of Alameda, duly given and made, the above named plaintiff was appointed administratrix of the estate of Donald L. Daulton, who died on the 6th day of October, 1952, and who was at the time of his death a resident of the City of Klamath Falls, County of Klamath, State of Oregon, and that ever since said date plaintiff has been and now is the duly appointed, qualified and acting administratrix of the estate of said decedent.

II.

That at all times herein mentioned defendant was and now is a duly organized and existing corpora-

tion doing business in the State of California and other states; that at all times herein mentioned defendant was and now is engaged in the business of a common carrier by railroad in interstate commerce in said state of California, and other states.

III.

That at all times herein mentioned defendant was a common carrier by railroad engaged in interstate commerce and Donald L. Daulton, deceased, was employed by defendant in such interstate commerce and the accident complained of arose while decedent and defendant were engaged in the conduct of interstate commerce.

IV.

That this action is brought under and by virtue of the provisions of the Federal Employers' Liability Act, 45 U.S.C.A. 51, et seq. and the Federal Boiler Inspection Act, 45 U.S.C.A. 23 et seq.

V.

That on or about the 6th day of October, 1952, at or about the hour of 2:58 p.m. thereof, decedant was employed by the defendant as a brakeman working on defendant's eastbound work train Engine No. 2716 which was moving in an easterly direction on the defendant's right of way west of the west switch at Wocus, Oregon, approximately 2½ miles north of Klamath Falls, Oregon.

VI.

That at said time and place decedent, acting in

the regular course and scope of his duties, was standing on the lead footboard on the engineer's side of said engine; that at said time and place said engine and its parts and appurtenances were improper and unsafe to operate in the service to which the same were put in that the said footboard upon which decedent was standing was so improperly fastened to the steel braces supporting the same that the head of a bolt was caused to and did protrude above the surface of said footboard by reason of which decedent was caused to fall from the footboard and onto defendant's tracks as a proximate result of which decedent received certain injuries which instantly resulted in his death.

VII.

That at said time and place the said engine and all of its parts and appurtenances were in an improper, unsafe and defective condition in violation of Section 23 of the Boiler Inspection Act, Title 45 on Railroads, U.S.C.A.

VIII.

That at the time of his death said Donald L. Daulton left surviving him as his heirs at law his widow, Mary Edith Daulton, and his minor children Gary Wayne Daulton, aged 6 years, and Virginia Geraldine Daulton, aged 4 years, who were dependent upon said decedent for their maintenance and support.

IX.

That at the time of his death decedent was a well

and a able bodied man of the age of Thirty-three years, and was earning and receiving from his employment with defendant the sum of approximately $575 per month which he contributed to the support of his widow and minor children aforementioned.

X.

That by reason of the facts hereinabove set forth and as a direct and proximate result thereof, plaintiff has been generally damaged in the sum of $150,000.

Wherefore, etc.

As and for a second, further, separate and distinct cause of action against defendant, plaintiff alleges as follows:

I.

Plaintiff refers to paragraphs I, II, III and IV of the first cause of action and by reference thereto incorporates the same herein with the same force and effect as though set out at length and in full herein.

II.

That on the 6th day of October, 1952, at or about the hour of 2:58 o'clock p.m. thereof decedent was employed by defendant as a brakeman working on defendant's eastbound work train Engine No. 2718 which was moving in an easterly direction on defendant's mainline track at or near the west switch switch of Wocus, Oregon, approximately 2½ miles north of the Town of Klamath Falls, Oregon.

III.

That at said time and place decedent acting in the regular course and scope of his duties, was standing on the lead footboard of the engineer's side of said engine preparing to alight therefrom for the purpose of lining a switch; that at said time and place said engine and all its parts and appurtenances were improper and unsafe to operate in the service to which the same were put in that the headlight on Engine No. 2718 was improperly attached to the center of the smoke box door of said engine thereby impeding the passage of decedent from the right lead footboard of said engine; that as a direct and proximate result thereof decedent was caused to and did fall from said footboard to the tracks of said defendant as a proximate result of which he received certain injuries which instantly resulted in his death.

IV.

That at said time and place the said engine and all of its parts and appurtenances were in an improper, unsafe and defective condition in violation of Section 23 of the Boiler Inspection Act, Title 45 on Railroads, U.S.C.A.

V.

Plaintiff refers to paragraphs VIII, IX and X of the first cause of action and by reference thereto incorporates the same herein with the same force and effect as though set out at length and in full herein.

Wherefore, etc.

As and for a third, further, separate and distinct cause of action against defendant, plaintiff alleges as follows:

I.

Plaintiff refers to paragraphs I, II and III of the first cause of action and by reference thereto incorporates the same herein with the same force and effect as though set out at length and in full herein.

II.

That this action is brought under and by virtue of the provisions of the Federal Employers' Liability Act, 45 U.S.C.A. 51, et seq.

III.

That on or about the 6th day of October, 1952, at or about the hour of 2:58 o'clock p.m. thereof decedent was employed by defendant as a brakeman working on defendant's eastbound work train engine No. 2718 which was moving along and upon defendant's tracks west of the west switch of Wocus, Oregon, approximately 2½ miles north of Klamath Falls, Oregon.

IV.

That at said time and place acting in the regular course and scope of his duties, decedent was standing on the lead footboard on the engineer's side of said engine preparing to alight from said engine for the purpose of lining a switch; that at said time and place the defendant by and through its em-

ployees other than said decedent so carelessly and negligently controlled, operated, and propelled said locomotive and train so as to cause said decedent to fall to the tracks of the said defendant and to receive certain crushing injuries which instantly resulted in his death.

V.

Plaintiff refers to paragraphs VIII, IX and X of the first cause of action and by reference thereto incorporates the same herein with the same force and effect as though set out at length and in full herein.

Wherefore, etc.

As and for a fourth, further, separate and distinct cause of action against defendant, plaintiff alleges as follows:

I.

Plaintiff refers to paragraphs I, II and III of the first cause of action and by reference thereto incorporates the same herein with the same force and effect as though set out at length and in full herein.

II.

That this action is brought under and by virtue of the provisions of the Federal Employers' Liability Act, 45 U.S.C.A. 51, et seq.

III.

That on or about the 6th day of October, 1952, at or about the hour of 2:58 o'clock p.m. thereof, decedent was employed by defendant as a brake-

man working on defendant's eastbound work train engine No. 2718 which was moving along and upon defendant's tracks west of the west switch of Wocus, Oregon.

IV.

That at said time and place acting in the regular course and scope of his duties, decedent was standing on the lead footboard on the engineer's side of said engine preparing to alight from said engine for the purpose of lining a switch; that at said time and place the defendant, its agents, servants, and employees, so carelessly and negligently owned, operated, maintained, managed, and controlled said locomotive and train as to cause said decedent to fall to the tracks of the said defendant and to receive certain crushing injuries which instantly resulted in his death.

V.

Plaintiff refers to paragraphs VIII, IX and X of the first cause of action and by reference thereto incorporates the same herein with the same force and effect as though set out at length and in full herein.

Wherefore, plaintiff prays judgment against defendant in the sum of $150,000, together with her costs of suit incurred herein.

HILDEBRAND, BILLS & McLEOD,
JAMES A. MYERS

/s/ By JAMES A. MYERS,
Attorneys for Plaintiff

Comes now the plaintiff and announces that a jury is required in said cause, as provided in Rule 38B of the Federal Rules of Civil Procedure.

Dated: May 20, 1954.

HILDEBRAND, BILLS & McLEOD,
JAMES A. MYERS

/s/ By JAMES A. MYERS

Duly Verified.

[Endorsed]: Filed May 24, 1954.

[Title of District Court and Cause.]

ANSWER

Comes now, Southern Pacific Company, a corporation, the defendant above named, and answering the complaint of the plaintiff on file herein, and each alleged cause of action thereof, shows as follows:

I.

Admits and avers as follows:

1. At all times mentioned in the complaint and herein this defendant was, and now is, a corporation duly organized and existing under and by virtue of the laws of the State of Delaware and doing business in the State of California and other states, and at all times was, and now is engaged, in the business of a common carrier by railroad in interstate commerce in the State of California and in other states.

2. On or about the 6th day of October, 1952, at or about the hour of 2:58 p.m. thereof, decedent, Donald L. Daulton, was employed by the defendant as a brakeman working on defendant's eastbound work train, Engine No. 2718, which was moving in an easterly diection on Defendant's right-of-way west of the west switch at Wocus, Oregon, approximately four miles north of Klamath Falls, Oregon. At that time and place decedent received certain injuries which instantly resulted in his death.

3. At the time of his death, and for considerable period of time prior thereto, decedent, Donald L. Daulton, was a resident of the City of Klamath Falls, County of Klamath, State of Oregon.

II.

Defendant is without information or belief on the subject sufficient to enable it to answer the allegations of the complaint and each of the alleged causes of action thereof with respect to surviving dependents, decedent's contribution to said dependents, if any, decedent's general health prior to the accident and decedent's conduct, except as hereinabove admitted or denied.

III.

Defendant denies the allegations of paragraphs I, II, III, IV, V, VI, VII, VIII, IX and X of the first alleged cause of action of the complaint, the allegations of paragraphs I, II, III, IV and V of the second alleged cause of action, the allegations of paragraphs I, II, III, IV and V of the third

alleged cause of action, and the allegations of paragraphs I, II, III, IV and V of the fourth alleged cause of action, except as hereinabove admitted or denied. Defendant denies each and every allegation of the complaint, and of each and every alleged cause of action thereof, not hereinabove admitted or denied. Defendant denies that plaintiff has been damaged in the sum of $150,000.00, or any lesser sum or any sum at all.

And for separate and independent answer and defense to the complaint and each and every cause of action thereof, defendant Southern Pacific Company shows as follows:

I.

Defendant here repeats and alleges all of the matters set forth in paragraph I of the first answer and defense above and incorporates them herein by reference the same as though fully set forth at length. If decedent, Donald L. Daulton, was injured in the manner alleged in the complaint or any of the alleged causes of action thereof, defendant is informed and believes and upon such information and belief alleges that decedent was negligent in the premises and in those matters set forth in the complaint and in each and every cause of action thereof and negligently conducted himself in and about and in respect to said locomotive and foot board, and that he negligently performed his duties as a brakeman with the result that he was fatally injured. Said conduct and said negligence of decedent, as aforesaid, proximately caused and

contributed to the injuries and damages, if any, alleged by the plaintiff.

And for a separate independent answer and defense to the complaint and each and every alleged cause of action thereof, defendant Southern Pacific Company shows as follows:

I.

Defendant here repeats and alleges all of the matters set forth in paragraph I of the first answer and defense above and incorporates them herein by reference the same as though fully set forth at length. If decedent, Donald L. Daulton, was injured in the manner alleged in the complaint or any of the alleged causes of action thereof, defendant is informed and believed and upon such information and belief alleges that decedent was negligent in the premises and in those matters set forth in the complaint and each and every cause of action thereof and negligently conducted himself on and about and in respect to said locomotive and foot board and negligently performed his duties as a brakeman with the result that he was fatally injured. Said conduct of decedent, as aforesaid, was the sole cause and the sole proximate cause of the injuries and damages, if any, alleged by the plaintiff.

Wherefore, defendant prays that plaintiff take nothing by her complaint on file herein, or any alleged cause of action thereof; that defendant have

a judgment for its costs of suit incurred herein; and for such other, further and different relief, the premises considered, is proper.

/s/ A. B. DUNNE,
/s/ DUNNE, DUNNE & PHELPS,
Attorneys for Defendant

Affidavit of Service by Mail attached.

[Endorsed]: Filed June 18, 1954.

[Title of District Court and Cause.]

PRETRIAL ORDER

The above entitled cause came on regularly for pretrial conference before the undersigned judge of the above entitled court on the 3rd day of August, 1955. Plaintiff appeared by D. W. Brobst and Edwin E. Driscoll, her attorneys. Defendant appeared by John Gordon Gearin, of its attorneys. The parties with the approval of the court agreed to the following

Statement of Facts

I.

On or about the 6th day of October, 1952, at or near the hour of 3:00 o'clock p.m. thereof, one Donald LeRoy Daulton was employed by defendant as a brakeman working on defendant's eastbound work train which was moving in an easterly direction on defendant's right of way in the vicinity of

Wocus, Klamath County, Oregon. At said time, said Donald LeRoy Daulton and the defendant were engaged in interstate commerce or in the furtherance thereof. At said time and place said Donald LeRoy Daulton received injuries which resulted in his immediate death.

II.

At the time of his death and for a considerable period of time prior thereto said Donald LeRoy Daulton was a citizen, resident and inhabitant of Klamath County, Oregon. Defendant at all times was and now is a Delaware corporation duly authorized to do business in the State of Oregon and is engaged in the operation of a railroad.

Plaintiff's Contentions

I.

Plaintiff contends that she is a citizen, resident and inhabitant of the State of Oregon and that on or about the 2nd day of August, 1955, by order of the Circuit Court of the State of Oregon in and for the County of Klamath, duly given and made, the above named plaintiff was appointed administratrix of the estate of Donald LeRoy Daulton and that ever since said date plaintiff has been and now is the duly appointed, qualified and acting administratrix of the estate of said decedent.

II.

Plaintiff contends that on the date aforesaid, said Donald LeRoy Daulton was standing on the lead footboard of a certain engine of defendant when

said footboard was improper and unsafe in that the said footboard was so improperly fastened to the steel braces supporting the same that the head of a bolt was caused to and did protrude above the surface of said footboard by reason of which said Donald LeRoy Daulton was caused to fall from the footboard and to receive his fatal injuries.

III.

Plaintiff contends that at said time and place while decedent was acting in the course and scope of his duties the defendant was careless and negligent in the following respects; that the bolts on the footboard where he was standing were not properly countersunk; that the footboard was unsafe in violation of the Federal Boiler Inspection Act (45USCA23); that deceased was allowed to ride on the footboard of the engine; that the train was not stopped immediately in accordance with custom and practice when the deceased went out of the vision of the other members of the train crew; that the engineer was operating the train and controlling the movements of the train without signals from the train crew; that the engineer was relying upon signals for the movement of his train from the conductor or the rear trainman, whereas the movement of the train should have been controlled by signals from the deceased or head brakeman. That by reason of the aforesaid conduct the said deceased, Donald LeRoy Daulton, was caused to fall from the footboard of said engine and receive his fatal injuries.

IV.

That the applicable company rules are Rules M, 7B, and 108.

V.

Plaintiff contends that at the time of his death said Donald LeRoy Daulton left surviving him as his heirs at law his widow, Mary Edith Daulton, and his minor children, Gary Wayne Dalton, aged 6 years, and Virginia Geraldine Daulton, aged 4 years, who were dependent upon said decedent for their maintenance and support.

VI.

Plaintiff contends that at the time of his death decedent was a well and able bodied man of the age of thirty-three years and was earning and receiving from his employment with defendant the sum of approximately $575.00 per month which he contributed to the support of his widow and minor children aforementioned.

VII.

Plaintiff, by reason of the foregoing, has been generally damaged in the sum of $150,000.00.

Defendant denies the foregoing and specifically denies that said engine or any parts or appurtenances were improper or unsafe or that it was guilty of negligence or that any act or omission on its part constituted a proximate cause of the death of said deceased.

Issues to be Determined

I.

Was defendant's engine improper or unsafe in any of the particulars charged and, if so, was such a proximate cause of the death of the deceased?

II.

Was the defendant guilty of negligence in any particular as charged and, if so, was such a proximate cause of the death of the deceased?

III.

What is the amount of plaintiff's damage?

Jury Trial

Plaintiff made timely request for trial by jury.

Physical Exhibits

Certain physical exhibits have been identified and received as pretrial exhibits, the parties agreeing, with the approval of the court, that no further identification of exhibits is necessary. In the event that said exhibits, or any thereof should be offered in evidence at the time of trial, said exhibits are to be subject to objection only on the ground of relevancy, competency and materiality.

Plaintiff's Exhibits

A. Picture of right front footboard of Engine 2718.

B. Picture of right front footboard of Engine 2718.

C. Picture of right front footboard of Engine 2718.

D. Actuarial table.

E. Transcript of Rules M, 7B and 108.

Defendant's Exhibits

1. Sealed Exhibit.
2. A to R Photographs.
3. Relay Report.
4. Wage Report.
5. Map.
6. Inspection Report.
7. A to R Inspection and Repair Reports.

The parties hereto agree to the foregoing pretrial order and the court being fully advised in the premises

Now orders that the foregoing pretrial order shall not be amended except by consent of both parties, or to prevent manifest injustice; and it is further

Ordered that the pretrial order supersedes all pleadings; and it is further

Ordered that upon trial of this cause no proof shall be required as to matters of fact hereinabove specifically found to be admitted, but that proof upon the issues of fact and law between plaintiff

and defendant as hereinabove stated shall be had.

Dated at Klamath Falls, Oregon this 3rd day of August, 1955.

/s/ JAMES ALGER FEE,
Judge

Approved:

/s/ D. W. BROBST,
Of Attorneys for Plaintiff

/s/ JOHN GORDON GEARIN,
Of Attorneys for Defendant.

[Endorsed]: Filed August 3, 1955.

[Title of District Court and Cause.]

VERDICT

We, the jury, duly impaneled and sworn to try the above entitled case, do find our verdict in favor of defendant against plaintiff.

Dated this 4th day of August, 1955.

/s/ H. E. HAMAKER,
Foreman

[Endorsed]: Filed August 4, 1955.

In the United States District Court for the District of Oregon

Civil No. 7687

MARY EDITH DAULTON, Administratrix of the Estate of Donald LeRoy Daulton, Deceased,
Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, a corporation,
Defendant.

JUDGMENT ORDER

The above-entitled cause came on regularly for trial before the undersigned judge of the above-entitled court and a jury at Klamath Falls, Oregon, on Wednesday, August 3, 1955. Plaintiff appeared by D. W. Brobst and Edwin E. Driscoll, her attorneys. Defendant appeared by John Gordon Gearin and R. B. Maxwell, of its attorneys. An order of substitution having been entered whereby the present plaintiff was substituted as party plaintiff in the place and stead of Agnes B. Thompson, the California administratrix, and the parties having stipulated in open court that no question would be raised by either party with respect to the transfer of the cause from the United States District Court for the Northern District of California, Southern Division, and both parties agreeing that the present case may be tried and judicially determined as though originally filed in the United States District Court for the District of Oregon and an amended

pretrial order having been approved by the parties and entered, the trial commenced after a jury was duly empaneled and sworn and opening statements had been made.

Evidence on behalf of both parties was introduced and received and thereafter and on the 4th day of August, 1955 when both parties had rested arguments to the jury were made and the court duly instructed the jury as to the law. Thereafter, and on the same day the jury, having deliberated, returned into open court its verdict in words as follows (formal parts omitted):

"We, the jury, duly impaneled and sworn to try the above entitled case, do find our verdict in favor of defendant and against the plaintiff.

H. E. HAMAKER,
Foreman"

Said verdict was received and filed and based thereon, it is hereby

Ordered and adjudged that plaintiff take nothing by her complaint and that defendant recover judgment of and against plaintiff, together with its costs and disbursements taxed herein at $100.12.

Dated this 4th day of August, 1955.

/s/ JAMES ALGER FEE,
Judge

[Endorsed]: Filed August 11, 1955.

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL

Comes now the plaintiff, Mary Edith Daulton, Administratrix of the estate of Donald LeRoy Daulton, in the above entitled cause and moves the Court to set aside the verdict and the judgment entered thereon and grant to the plaintiff a new trial as to all issues for the following reasons:

1. That the verdict is contrary to the evidence;
2. That the verdict is contrary to the weight of the evidence;
3. That the verdict is contrary to the law;
4. That the Court erred in giving to the jury instructions involving the contributory negligence of the deceased and instructed the jury further that if deceased's contributory negligence was the sole cause of the accident there could be no recovery by the plaintiff;
5. That the defendant did not disclose at the pretrial conference the defense that the pictures submitted by the plaintiff showing the running board of the engine involved in the accident were not of the running board actually on the engine at the time of the accident.
6. That the evidence is insufficient to sustain the judgment.

/s/ HILDEBRAND, BILLS & McLEOD,
/s/ D. W. BROBST,
Attorney for Plaintiff

Affidavit of Service by Mail attached.

[Endorsed]: Filed August 17, 1955.

[Title of District Court and Cause.]

AFFIDAVIT IN OPPOSITION TO PLAINTIFF'S MOTION FOR NEW TRIAL

State of Oregon,
County of Multnomah—ss.

I, John Gordon Gearin, being first duly sworn, depose and say: That plaintiff in her motion for a new trial, Sub-paragraph 6, contends that defendant did not disclose at the pretrial conference the defense that the pictures submitted by plaintiff showing the running board of the engine involved in the accident were not of the running board actually on the engine at the time of the accident, and in her motion, Page 2, contends that at the trial without previous notice to plaintiff, defendant introduced evidence to show that the running board of the engine had been changed the morning following the accident and before plaintiff's witnesses saw the running board, and contends that plaintiff showed the defendant pictures of the running board and that at the time of pretrial conference there was no indication that such running board was not on at the time of the accident and further contends that this alleged fact was not developed until the second day of trial and that plaintiff had no way of knowing that the running board had been changed.

I make this affidavit in opposition to the foregoing contentions and claims of the plaintiff. The plaintiff at no time made any request for admission with respect to the photographs which in fact were taken approximately fourteen months following the

accident and made no use whatsoever of the discovery procedure permitted under the Federal Rules of Civil Procedure.

The matter of the removal of the footboard and pilot from the locomotive following the accident was discussed between Mr. Brobst and myself the evening before the trial and before the pretrial order was submitted to the court. I talked to Mr. Brobst in the Willard Hotel by telephone the evening before trial and the subject of the conversation was the footboard because Mr. Brobst had directed a Mr. Guderian, commercial photographer in Klamath Falls, whose offices and place of business are located at North Main Street, to take photographs of the front of the locomotive after the original footboard had been replaced, i.e. on Tuesday, August 2, 1955. (Mr. Guderian is the same individual whose office took the pictures of the locomotive fourteen months after the accident). I believe that Mr. Brobst had photographs of the original pilot of the locomotive in his possession before the trial commenced.

With respect to the photographs, the pretrial order as finally submitted and agreed upon by the parties contained the notation that the defendant did not waive the identity of the photographs which were marked as plaintiff's exhibits and which were the photographs taken fourteen months after the accident.

It was disclosed to the jury in my opening statement that the footboard had been removed immediately after the accident and plaintiff made no

request for continuance or made no objection thereto until the filing of her motion for new trial herein. The plaintiff did not claim surprise during the trial. The failure of the plaintiff to exercise her rights under the federal discovery procedure and to produce at trial photographs accurately portraying the locomotive, its footboard and pilot, in no way relate to a matter of defense.

/s/ JOHN GORDON GEARIN,
Of Attorneys for Defendant

Subscribed and sworn to before me this 24th day of August, 1955.

[Seal] /s/ NOELLE BURTON,
Notary Public for Oregon

Affidavit of Service by Mail attached.

[Endorsed]: Filed August 25, 1955.

[Title of District Court and Cause.]

ORDER

Plaintiff's motion for a new trial came on regularly for hearing before the undersigned judge at San Francisco, California on Friday, October 14, 1955 at the hour of 2:00 o'clock p.m. Plaintiff appeared by D. W. Brobst, of her attorneys, and defendant appeared by John Gordon Gearin, of its attorneys. The court having heard argument of counsel and being fully advised in the premises

Now orders that plaintiff's motion for new trial be and the same hereby is denied.

Dated this 24th day of October, 1955.

/s/ JAMES ALGER FEE,
Judge

[Endorsed]: Filed October 24, 1955.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given, that Mary Edith Daulton, Administratrix of the Estate of Donald LeRoy Daulton, deceased, plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on the 4th day of August, 1955.

/s/ D. W. BROBST,
Attorney for Appellant

Affidavit of Service by Mail attached.

[Endorsed]: Filed October 24, 1955.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, R. DeMott, Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing documents consisting of Complaint; Answer; Pre-trial order; Verdict; Judg-

ment order; Plaintiff's motion for new trial; Affidavit in opposition to plaintiff's motion for new trial; Order denying motion for new trial; Notice of appeal; Undertaking on appeal; Designation of record; Order to include exhibits in record on appeal; Appellee's designation of record and Transcript of docket entries, constitute the record on appeal from a judgment of said court in a cause therein numbered Civil 7687, in which Mary Edith Daulton, administratrix of the Estate of Donald LeRoy Daulton, Deceased is the plaintiff and appellant and Southern Pacific Company, a corporation is the defendant and appellee; that the said record has been prepared by me in accordance with the designations of contents of record on appeal filed by the appellant and the appellee, and in accordance with the rules of this court.

I further certify that there is being forwarded under separate cover Plaintiff's exhibits A, B, C, D, E, and F—and Defendant's exhibits 1, 2a to 2k; 2m and 2n; 2q; 3, 5, and 6. Counsels' opening statements to jury and the reporter's transcript will be forwarded at a later date.

I further certify that the cost of filing the notice of appeal, $5.00, has been paid by the appellant.

In testimony whereof I have hereunto set my hand and affixed the seal of said court in Portland, in said District, this 13th day of December, 1955.

[Seal] R. DE MOTT,
Clerk

In the United States District Court, District of Oregon

Civil No. 7687

MARY EDITH DAULTON, Administratrix of the Estate of Donald LeRoy Daulton, Deceased,
Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY,
a corporation, Defendant.

Klamath Falls, Ore., August 3, 1955

Before: Honorable James Alger Fee, Judge, Court of Appeals, Ninth Circuit, sitting by assignment as one of the judges of the above-entitled Court.

Appearances: Messers. D. W. Brobst and Edwin E. Driscoll, of the counsel for plaintiff. Mr. John Gordon Gearin and Mr. R. B. Maxwell, of counsel for defendant.

OPENING STATEMENTS TO THE JURY

Mr. Brobst: If the Court please, and Ladies and Gentlemen of the Jury—I should say Lady and Gentlemen of the Jury—at this time I will state to you what we expect to prove by our [1*] witnesses on the witness stand. The purpose of my making this statement now is that so you may better follow

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* Page numbers appearing at top of page of original Reporter's Transcript of Record.

the testimony as it is produced on the witness stand. Sometimes in a case of this type it is difficult to have the witnesses in proper order, so that the testimony comes in piecemeal, so what I tell you now you can have in mind as we are attempting to introduce our evidence and you will be better able to follow the testimony.

The evidence will show that the deceased, Mr. Daulton, was employed by the Southern Pacific Company as a brakeman. He was working on a work train out here at Wocus, which is a little distance north of town. They were putting in a traffic control system out there and they had been working along there during the day.

At the time the accident happened there was a train that was coming by going south and one going north. So that the jury won't be confused, there are different directions. The railroad men say one direction which sometimes is opposed to the compass direction. In other words, a train that is leaving Klamath Falls and going toward Portland the railroad men say that is going east. It may be actually going north, but the railroad men say east. If it is coming toward Klamath Falls from Portland, they say it is westbound. I will try to keep the record straight as the witnesses testify, but sometimes lay witnesses will say north and railroad men will say [2] east, and it seems like there is a conflict whereas there really isn't. But we will endeavor to keep that clear as the witnesses testify.

At any rate, they were out on this work train, and there was a train that was coming south and

there was one going north, and this work train had proceeded to get into the clear so that these trains could pass along on the main line. They had to go for a distance of about three-quarters of a mile, I think the testimony will be, or in the neighborhood of 75 to 100 car lengths, a car length being estimated at 50 feet. That would run somewhere around 5,000 feet that they had to move the work train.

As they started out the conductor was stationed in the caboose, one of the brakemen known as the rear brakeman was riding along on the rear step of the caboose on the engineer's side, and the deceased, Mr. Daulton, was riding on the front right-hand running board of the engine, or footboard, which is out in front of the engine. The move was being made in an easterly direction according to railroad terms and a northerly direction according to the compass. As they started out down the track they proceeded along about 15 or 20 miles per hour, and as they approached the switch where they were to turn off to get out of the way of these other trains the speed of the move was cut down to around somewhere between two, three and four miles an hour; in other words, to a very [3] slow speed.

Mr. Daulton was out on the front of the engine so he could control the movement along there. There were workmen working there. I believe there were welders on the track that were putting in a signal system of some kind. He rode along there on the front footboard, and it was his duty when they came up to where the switch was to stop the move, get off and throw the switch and get back on and they

would ride on out into the clear with the train.

Now the evidence will show this: That there was a custom and practice on the railroad which is so firmly fixed in the minds of the workmen that it is almost a mandatory rule that when an engineer is taking signals from a brakeman or another trainman and that trainman goes out of the vision of the engineer he should immediately stop the train.

As they came down there I believe the evidence will show that this move was some five, six or seven car lengths away from the switch, and proceeding at a speed of from two to four miles an hour, right in that vicinity, and that Mr. Daulton went out of the vision of the engineer; that the engineer nevertheless continued on for those four or five car lengths, and then of his own accord, and without a signal from anyone, stopped the train. The evidence will show from the personal affects that were scattered along the track that [4] Mr. Daulton had been dragged some four or five car lengths before the move came to a stop, and the evidence will also show that the move as it was going along there could have been stopped in a matter of two, three or four feet by an application of the brakes, so that when Mr. Daulton had gone out of the vision of the engineer an immediate application of the brakes would have stopped the move in two or three feet and Mr. Daulton would not have been dragged the four or five car lengths that the evidence will show happened.

The evidence will further show that the running board on the front end of the engine is secured with

steel brackets that hold a board which is about ten inches or a foot wide and about two inches thick, and there are bolts that go down through the footboard to hold it to these brackets. The evidence will show that on that particular running board or footboard on the front of the engine the bolts were not completely countersunk. In other words, they are a rounded type of carriage bolt—we will have pictures that you can see—and the rounded type of carriage bolt, being metal, extends up above the wooden part of the platform, making a hard, smooth surface to step on, and instead of having the bolts completely countersunk so that there would be no smooth metal extending above the board the evidence will show that one bolt in the center of the footboard extended up and was tilted so that one edge of it was up in the neighborhood [5] of three-eighths to a quarter of an inch, sufficient to catch the heel of a workman walking or standing there on the front of the engine. So that made it an unsafe place to stand or to work.

That question will be left to you to determine, as to exactly how this accident happened. That falls within your province as triers of the facts. We will present the facts that I have told you about.

As a result of these conditions, and the failure of the engineer to follow the custom of immediately stopping when a trainman goes out of his vision—he was out there for the purpose of guiding the train and giving signals, and if he were not out there for that purpose the evidence will show that it was then the duty of the engineer to see that Mr.

Daulton rode in the cab of the engine instead of on the footboard, unless he was out there for the specific purpose of guiding the movement of the train.

The evidence will show that Mr. Daulton at the time of his death was 34 years old; that he was earning in the neighborhood of $550 per month; that he was the sole support of Mrs. Daulton and the two minor children.

I believe that covers it.

Mr. Gearin: If the Court please, and Lady and Gentlemen: I think we should introduce ourselves. Those of you around this part of the county know Mr. Driscoll and my associate, [6] Mr. Maxwell. My name is John Gearin, and I practice law in Portland. I am with the firm of Koerner, Young, McColloch & Dezendorf in that city. The lawyer who has just spoken to you is Mr. D. W. Brobst of Oakland, California. He is associated with the firm of Hildebrand, Bills & McLeod of that city.

The issues in this case are primarily these as to the charges and contentions of negligence made against the company: It is the contention of the plaintiff, Mrs. Daulton, that there was a defect in the engine and the company was guilty of negligence in having something the matter with the headlight or the light on the locomotive, and that there was a defect in the footboard.

One of the most difficult questions for you to determine is the question of proximate cause, the question of what caused the accident. You will hear the testimony of those people who were there.

The welders that were along the side of the railroad that Mr. Brobst mentioned were perhaps 1,000 or 1,500 feet away from where the accident occurred.

Now the work train was proceeding, and the engineer was in the cab looking out. It was his duty to see the signal up there at the siding, where they had to get off the main track because there was a Great Northern train coming down. It was about 3:00 o'clock in the afternoon, or just before, [7] and they had to put the work train in on the siding. It was the obligation of the engineer to watch for the signal so that when he got up there he could stop, and then the deceased would get off the footboard.

Now, with regard to the allegations or charges of custom and practice that Mr. Brobst has just mentioned, this is the first time that we have been advised that it was a question of custom and practice. We will answer that by saying that the testimony will be the deceased, Mr. Daulton, could have ridden in the cab of the locomotive had he so desired, but he chose to ride out there; that the engineer would, in any event, have stopped the locomotive at the switch so that the brakeman could either have gotten off the front end or gotten out of the cab and went up and turned the switch to allow the train to go into the siding.

Now as far as the negligence of the company is concerned, first of all the primary charge is being made that there was this bolt sticking up in the middle of the footboard. Now this accident hap-

pened around 3:00 o'clock in the afternoon. The train got in at dark or almost dark that night. Immediately photographs of that engine and footboard were taken. The photographs taken the night of the accident will disclose that there was no bolt whatsoever in the middle of the footboard. The next morning the locomotive and the footboard was again photographed, and we will have those photographs here for you. And [8] because something happened, or something may have happened to the footboard—it may have been bumped or something like that—the board was removed the morning after the accident. It has been put aside in the storeroom until yesterday, when it was replaced on the locomotive.

The photographs about which Mr. Brobst has told you and which he has exhibited to us—because in Federal practice we exhibit all our exhibits to the other party—those photographs were taken after the footboard was replaced, and where is there a picture of a bolt in the middle which, according to my interpretation of the photographs, will show that it is practically level with the board. It is one of those round-headed bolts that is right down flat into the wood. But the photographs Mr. Brobst will identify to you were taken by Mr. Guderion, a local photographer, in the month of December, 1953, a little over a year and two months after the accident. It will be our evidence, and I think a preponderance of the evidence, that the footboard upon which the deceased was riding was absolutely free of all obstructions. At least, the engine was in-

spected immediately upon its return that evening. We will have the inspection report for you, and we will have the testimony of a State police officer who went to the scene of the accident immediately after the accident and who made a thorough investigation. His testimony will be that there were no defects on the locomotive, and that the [9] footboard was smooth and free from obstructions.

Just what significance there is in the charge that there was something the matter with the headlight I fail to see——

Mr. Brobst: I might interrupt and say we are not pressing that. That was just a matter of pleading. As far as that contention is concerned, we won't make any charge on that.

Mr. Gearin: That is withdrawn?

The Court: Then that allegation is withdrawn?

Mr. Brobst: Yes, your Honor.

The Court: The pleading will be so amended.

Mr. Gearin: That raises the question, then, and I will say that there is no contention made by the plaintiff that there was any rough handling of the train; in other words, there wasn't any jerking or a sudden stop, or anything like that that caused the man to fall from the front of the locomotive.

The last that he was seen he was alive and in good spirits. He fell off, but how he met his death or what happened no one knows.

We merely ask you in determining this case, in which we submit there may be an element of sympathy, and very properly so, that you wait until you hear all the evidence so that you can weigh the

evidence in an impartial light, bearing [10] in mind that the burden is upon the plaintiff to prove her charges that the company was at fault and that the company caused the death of the deceased.

Thank you.

(Thereupon the jury was excused until 1:30 o'clock p.m. of the same day.) [11]

[Endorsed]: Filed December 19, 1955.

[Title of District Court and Cause.]

TRANSCRIPT OF PROCEEDINGS

Klamath Falls, Oregon, August 3, 1955

Before: Honorable James Alger Fee, Judge, Court of Appeals, Ninth Circuit, sitting by assignment as one of the judges of the above-entitled Court.

Appearances: Messrs. D. W. Brobst and Edwin E. Driscoll, of counsel for plaintiff. Mr. John Gordon Gearin and Mr. R. B. Maxwell, of counsel for defendant.

The Court: Are there any preliminaries in this Civil No. 7687? [1*]

Mr. Gearin: Only this, your Honor: The action is brought by Agnes B. Thompson, a California resident, and I called that to Mr. Brobst's attention on Monday night, and yesterday an Oregon adminis-

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* Page numbers appearing at top of page of original Reporter's Transcript of Record.

tratrix was appointed. We want to stipulate for the substitution of Mrs. Daulton as plaintiff. She is a duly qualified and acting Administratrix of the Estate of Donald LeRoy Daulton, Deceased. With that preliminary matter we are ready to proceed. Our exhibits have been marked by the Court Reporter, and I have submitted to the Clerk our requested instructions. We are ready to proceed if the Court will permit the substitution, which we are willing to stipulate to.

Mr. Brobst: That is correct.

The Court: The stipulation will be observed and the substitution made. The pleadings will be deemed to be amended with this Oregon administratrix as plaintiff, and that she has power to bring the action.

I shall ask a stipulation of the parties that no error will be claimed upon the ground that this case was originally filed with a different party plaintiff in the Northern District of California, and that it will be tried on the same basis by consent of the parties as if it had been originally filed in this jurisdiction with the present plaintiff.

Mr. Gearin:: We so stipulate on behalf of the defendant. [2]

Mr. Brobst: We so stipulate.

(Thereupon a jury was duly and regularly empaneled and sworn to try the above-entitled cause.)

The Court: Proceed.

Mr. Probst: Your Honor, before taking of testimony could we have an order excluding the witnesses?

Mr. Gearin: We join in the request, your Honor.

The Court: All witnesses who are to be called in the case with the exception of the plaintiff and one executive for the defendant will be excluded from the courtroom.

Mr. Gearin: Mr. Irvine is not an executive, but he is the only one here with us. He is a claim agent. I doubt if he will have to testify, your Honor.

The Court: In any event, all the rest of the witnesses are excluded and will remain outside the courtroom except during the time that they are called on the witness stand up until the time the Court finally submits the case to the jury by instructions. The Bailiff will enforce the order. All witnesses will now leave.

(Thereupon opening statements were made by counsel for the respective parties, the jury was excused until 1:30 o'clock p.m. of the same day, and thereafter, during the absence of the jury, the following [3] proceedings were had:)

Mr. Brobst: Your Honor, I wonder if I could take up a matter with the Court and counsel in chambers for a moment.

The Court: No. I never take up anything in chambers. You can speak to me right on the bench.

Mr. Brobst: I wanted to make this suggestion: I noticed your Honor on several occasions said that we must establish negligence to recover. Now we don't have to under the Federal Boiler Inspection Act. All we have to do is establish a violation of the Act and negligence is not involved.

The Court: Your pre-trial order does not reflect that.

Mr. Brobst: I believe it does, our Honor.

The Court: I don't think it does.

Mr. Brobst: I wanted to call attention to that because I just read a Supreme Court case in which——

The Court: I understand that perfectly. I have tried a lot of these cases, and I understand that is true, but here is the thing I am trying this case on: Was the defendant's engine improper or unsafe in any of the particulars charged and, if so, was such a proximate cause of the death of the decedent? In so far as the first issue is concerned, I will submit it on that basis. Then as to the question of negligence in the particulars charged, was that the proximate cause of the death? I don't think I have said anything counter to that. I have tried hundreds of these cases. [4]

Mr. Brobst: I just wanted to be sure. I don't want any error.

The Court: No, I don't want any error either. In addition, I will take up a couple of other matters. With regard to the argument I will say that I think it is improper argument to mention this business about the taxable features, and I also think that this idea of an adequate recovery which has been advanced, arguments that are made on that basis are likewise improper.

Mr. Brobst: I don't do that.

The Court: I will use one as a guard against the other. If you should argue on one side, I will

permit argument on the other side. I don't charge Counsel with doing that, but I have had it done in a lot of these cases, and in three or four cases I have set aside the verdict on the ground that it was improper, in my opinion.

Mr. Brobst: All that I would do in this type of case is to put in the actuarial table which shows the loss, and there it is.

The Court: I see no difficulty about that. Now about this question of how many feet it would take to stop this train, if that is in issue at all, I don't think that ought to be the subject of expert testimony at all. I think you ought to be able to agree as to how many feet it would take to stop this train, if that is in issue.

Mr. Gearin: I didn't know that that was in issue.

Mr. Brobst: It will come up as an issue.

Mr. Gearin: I will have to acquaint myself with what the facts are. The engineer will be able to testify.

The Court: In any event, I don't think that is a subject of expert testimony. Both sides should be able to agree so there can't be much question about it, in any event.

Mr. Brobst: They have all told me around four or five feet. Counsel can verify it with his men.

The Court: With a train moving at four miles an hour, I wouldn't think it would take much for counsel on both sides to establish how long it would take to stop it considering the weight that is behind it.

Mr. Gearin: We appreciate the opportunity of discussing these features before the Court without the jury being present. One thing that disturbs me is the statement made by counsel relying upon custom and practice, when there is no contention made of a violation of the custom and practice or the company rules. I think in all fairness to Counsel I should advise him that I will have to object to the introduction of any testimony regarding that because there is no issue raised by the pre-trial order in that regard.

Mr. Brobst: It comes under the heading, I thought, of the failure of the engineer to stop. We have that in there. I thought that was fully covered in the order under that heading. [6] If Counsel was misled at all, I certainly didn't mean to.

The Court: The ordinary rule of pleading is that you must plead the reference to a rule that you are relying on or give the rule that you are relying on, or you must plead custom and practice.

Mr. Brobst: The trouble is that pleadings in different jurisdictions are different.

The Court: That is the rule in California.

Mr. Brobst: You will notice our pleading there is general.

The Court: I am talking about the pre-trial order. The pre-trial order is the consolidated pleading. It doesn't say anything about it.

Mr. Brobst: I didn't know, frankly, that you had to set out the rule. I thought it was sufficient to put down that he failed to stop.

The Court: I don't think you have to set out

the rule, but I think you have to say that there is a rule that you are relying on.

Mr. Brobst: That is a custom and practice, that he failed to stop.

The Court: All right. Let's put it in the pre-trial order, then. This pre-trial order is subject to a lot of amendments already, so I think you better rewrite it during the day.

Mr. Brobst: We will do that, then. We will rewrite it. [7] I will tell Counsel what I have in mind. I don't want to mislead anybody or bring into the case anything that he is not fully aware of.

The Court: All right. We will recess until 1:30.

(Thereupon a recess was taken until 1:30 p.m., at which time Court reconvened and proceedings were resumed in the presence and hearing of the jury as follows:) [7A]

HERMAN F. BIWER

was produced as a witness in behalf of the plaintiff and, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Brobst): Mr. Biwer, what is your business or occupation, please?

A. I am a Southern Pacific Railroad brakeman.

Q. Where do you live?

A. 820 California, Klamath Falls.

Q. How long have you been employed by Southern Pacific Company?

A. Since May the 8th, 1941.

(Testimony of Herman F. Biwer.)

Q. Back on October the 6th of 1952 were you working on a work extra No. 2718?

A. Yes, sir.

Q. Where were you working?

A. I was the conductor on the extra.

Q. Who were the other members of the crew?

A. John J. Ruger was the rear brakeman and Donald Daulton was the head brakeman.

Q. Do you know who the engineer and the fireman were?

A. The engineer was Shively. I don't know his first name.

Q. And the fireman?

A. The fireman was Slaughter. I don't know his first name.

Q. Where was your work train working?

A. We were working about one mile—three-quarters of a mile to one mile west of Wocus. [8]

Q. What was the general nature of your work?

A. We were widening a cut and putting in new signals for the CTC on the main line.

Q. Were there workmen working along the tracks up there? A. Yes, sir.

Q. What type of workmen were they?

A. Welders were working on the curve west of Wocus.

Q. You were the conductor on the train that was involved in this accident which resulted in the death of Mr. Daulton? A. Yes, sir.

Q. As far as the track up there where the work

(Testimony of Herman F. Biwer.)

was being done, would you state whether or not it was on grade?

A. It was on a slight down grade and a curve.

Q. In which direction?

A. I believe where we was actually digging it was curved towards the left, facing east on the railroad directions.

Q. You mentioned east on the railroad. Is that the railroad direction or the compass direction?

A. That is the railroad direction. It is north on the compass direction.

Q. All right. Now getting down to the time that the accident happened, what was the particular move that was being made at the time the accident happened?

A. We were headed towards the Wocus siding to go into the clear. We had a train coming out of Klamath Falls and one [9] coming from Algoma towards us, and we had to be in the clear at Wocus for these trains.

Q. Of what did your train consist?

A. The engine, two K&J cars, a ditcher, and a caboose.

Q. When you say a K&J car, what kind of a car is that?

A. They are a side dump ballast car.

Q. How far did your train have to travel to get into the clear?

A. We had approximately three-quarters to one mile.

Q. How did you get into the clear? What do you

(Testimony of Herman F. Biwer.)

do when you get down to the point where you get into the clear?

A. When you get down to the switch the head brakeman lines the switch and lines you into the side track.

Q. After you go into the side track who re-lines the switch?

A. The rear brakeman re-lines the switch behind the caboose.

Q. Now as you started to move down toward where you would be in the clear, where did you ride? A. I was in the caboose.

Q. Where did Mr. Ruger ride?

A. Mr. Ruger was on the step of the caboose.

Q. Do you know where Mr. Daulton was?

A. On the footboard of the engine, on the engineer's side.

Q. Did you see him up there? A. No, sir.

Q. Where was he the last time you saw him, as you recall now? [10]

A. He was standing on the ground the last time I seen him.

Q. Then the move started on down toward the switch? A. Toward the switch.

Q. What was the first thing that made you know something unusual had occurred?

A. When we didn't get into the clear, move towards getting into the clear, right away I knew something had happened.

Q. Then did you go out and go forward?

A. Yes, sir.

(Testimony of Herman F. Biwer.)

Q. How far was the engine stopped west or south of the switch?

A. Oh, about one car length or two car lengths from the switch.

Q. When you got up there did you see Mr. Daulton? A. Yes, sir.

Q. Where was he when you got up there?

A. He was laying underneath the front trucks of the tender of the engine.

Q. How long is that engine, approximately, in feet?

A. Oh, approximately 75 or 80 feet, I would say.

Q. Did you see any of the personal effects of Mr. Daulton? A. Yes, sir.

Q. Would you just tell us where you saw those.

A. They were about three to four car lengths behind the engine from where we had stopped.

Q. Would that be behind the engine or behind where he was? [11] A. Behind where he was.

Q. What would you estimate the length of one of those cars to be?

A. Approximately 35 feet.

Q. Now, you yourself never saw, as I understand it, Mr. Daulton on the front footboard?

A. No, sir; I didn't.

Q. In your experience as a trainman—first, just describe what has been generally your work as a brakeman and conductor.

A. Well, the majority of my work as brakeman was in the Klamath Falls yard. We let the brakes

(Testimony of Herman F. Biwer.)

off the train when we get out on the road, and we let our engines in and out of the sidings.

Q. Did you have anything to do with switch work? Have you done switching?

A. Yes, sir; we do. We don't do any switch work in the Klamath Falls yard, but we do all our own switching at Alturas, and out on the road we do our own switching.

Q. How is that done? Who gives the various signals for the movements when you are switching?

A. They have three brakemen on most of them. They have what they call a swing man. He is the one that gives the signals, if possible. They give all signals on the engineer's side.

The Court: I am in a little doubt about this. Is this witness relating the method of procedure in the Klamath Falls [12] yard or some place else?

Mr. Brobst: Q. Is that procedure followed generally, whether it is in the Klamath Falls yard or out on the road?

A. It is followed out on the road as well as in the Klamath Falls yard.

Q. Now the signals are relayed to whom?

A. They are relayed—if the swing man can't see the engineer the head man takes and gives the signals to the engineer.

Q. Assume this, Mr. Biwer: That a trainman is out on the front footboard of an engine, where he is seen by the engineer, and then the man on the front footboard goes out of the vision of the engineer, is there any custom or practice relative to

(Testimony of Herman F. Biwer.)

what the engineer should do under those circumstances?

Mr. Gearin: We object to the form of the question, your Honor.

The Court: I don't think it is a proper hypothetical question.

Mr. Brobst: I didn't hear your Honor.

The Court: I don't think it is a proper hypothetical question. Objection sustained.

Mr. Brobst: Q. Mr. Biwer, is there any custom or practice relative to the conduct of an engineer or what he should do when a man from whom he is receiving signals goes out of his vision? [13]

A. Yes, sir; there is.

Q. Would you tell us what that custom and practice is.

A. It has been the practice of engineers to stop when a man giving signals disappears from sight.

Q. Now Mr. Biwer, do you have a recollection as to how fast that movement was being made at the time the accident happened?

A. Between two and four miles an hour.

Q. In your experience as a trainman, in what distance could that movement be stopped by the engineer? A. Oh, within 10 to 15 feet.

Q. Who has charge of the train in a movement of that kind?

A. The conductor jointly with the engineer.

Q. What would be the purpose of Mr. Daulton being out on the front footboard of that engine?

A. Well, piloting by the welders that was work-

(Testimony of Herman F. Biwer.)

ing there in case they didn't have their equipment off the track, and also to let him into the siding.

Mr. Gearin: I didn't hear that.

A. To pilot him by the welders and equipment that would be on the track, and also to let him into the siding.

Mr. Brobst: Q. Did you yourself examine the footboard after the accident, Mr. Biwer?

A. No, sir; I didn't.

Mr. Brobst: I have no further questions. [14]

Cross Examination

Q. (By Mr. Gearin): Mr. Biwer, you have never operated an engine, have you?

A. No, sir.

Q. You have never made any tests or experiments in connection with the stopping distance of trains?

A. I have with cars; yes, sir.

Q. But as to cars such as you had here, K & J cars, ditchers, spreaders, caboose, engine and tender?

A. No, sir; I haven't.

Q. All right. Now, as the engine approached the siding there was a signal there, was there not, and a switch?

A. There was a block signal there; yes, sir.

Q. And the duty of the engineer is to watch the block signal?

A. Not necessarily, sir.

Q. As the engine would come up to the siding the brakeman would line the switch; that is, the

(Testimony of Herman F. Biwer.)

switch that was there so that the train could go into the siding? A. Yes, sir

Q. All right. Wouldn't the brakeman have to signal the engineer that they were approaching the siding or the switch?

A. No, sir. He would have the block signal to go by.

Q. What personal effects did you find of the deceased?

A. I didn't find them. I seen a pencil and note-book and money scattered along the right-of-way.

Q. For how long a distance in feet?

A. Oh, I would say approximately between a hundred and hundred and fifty feet.

Q. Would you say that this move that you made at the time the deceased lost his life was made according to your regular custom and practice?

A. Yes, sir.

Q. The last time you saw Mr. Daulton what was his physical appearance?

A. Fine. He felt good. We just had lunch at Klamath Falls, and we had been back at work and he felt good. He was full of pep.

Q. His usual self? A. Yes, sir.

Q. Now, these welders that you mentioned, they were a good thousand feet or so away from the accident, were they not?

A. Yes, sir. They were 75 cars away from the accident.

Q. You were on the main line?

A. Yes, sir.

(Testimony of Herman F. Biwer.)

Q. You were not backing the engine?

A. No, sir.

Q. You were not backing cars?

A. No, sir.

Q. Were you shoving cars ahead of the engine?

A. No, sir. [16]

Q. I take it—I know you will correct me if I am wrong—as you were approaching the siding the train was going forward, and there was the engine, the engine tender, two K & J cars, a ditcher, a spreader—do you remember the spreader?

A. Yes.

Q. And then the caboose?

A. Behind the engine and tender there was a K&J car, then a ditcher, then a K&J, then the spreader, and the caboose.

Q. And you were in the caboose?

A. Yes, sir.

Q. Do you know of your own personal knowledge where Mr. Daulton was at the time of the accident? A. No, sir.

Mr. Gearin: I wonder, Mr. Kenyon, if I might have Exhibit No. 1, which is a sealed exhibit for impeachment purposes only.

Q. Mr. Biwer, through the courtesy of the Marshal, I would like to hand you a document marked Exhibit No. 1, which is a sealed exhibit. I will ask you if you can identify that document, and I will ask you if your name and signature appears any place thereon. A. Yes, sir.

Q. Referring to page 6, I will ask you if your

(Testimony of Herman F. Biwer.)

name appears thereon, and in how many places.

A. Once. [17]

Q. Did you sign it somewhere in the middle of the page, Mr. Biwer?

A. That is the only place I signed it, was in the middle of the page.

Q. All right, sir. Do you recall giving that statement to Mr. Irvine, who sits here behind me?

A. Yes, sir.

Q. On October 7, 1952? A. Yes, sir.

Q. You signed that statement freely and voluntarily, did you? A. Yes, sir.

Q. And that statement contains the version of the accident as you gave it to Mr. Irvine the day following the accident? A. Yes, sir.

Q. Is that a true statement of what occurred?

A. It was what I thought occurred; yes, sir.

Mr. Gearin: I will ask that that be marked as Exhibit 1-A, your Honor, and that it be received in evidence, being offered solely for the purpose of impeachment.

Mr. Brobst: I have no objection, your Honor.

The Court: Admitted.

(The statement referred to was received in evidence as Defendant's Exhibit 1-A.)

Mr. Gearin: Mr. Brobst, will you stipulate with me that [18] the exhibit which was just received may be read to the jury at any time?

Mr. Brobst: Yes, that is all right. Will you stipulate also that is in the handwriting of Mr. Irvine and not Mr. Biwer?

(Testimony of Herman F. Biwer.)

Mr. Gearin: That is correct.

Q. Now this custom of the engineer to stop, Mr. Biwer, that is embodied in Rule 7-B of the rules and regulations of the Transportation Department, is it not? A. Yes, sir.

Q. To refresh your memory, so we are talking about the same thing, that rule provides as follows, does it not: "In backing an engine or cars, or shoving cars ahead of an engine, the disappearance from view of a trainmen or lights by which signals controlling the movement are being given, must be construed as a stop signal." That is the custom and practice to which you referred, is it not?

A. No, sir. That is part of it. It has just been a past practice whenever a brakeman or his light disappears from sight the engineer will stop.

Q. There is no rule on that, to your knowledge?

A. No, sir; not to my knowledge.

Mr. Gearin: I think that is all. [19]

Redirect Examination

Q. (By Mr. Brobst): Mr. Biwer, did you have occasion to watch Mr. Daulton in his work?

A. Yes, sir.

Q. How did he perform his work as far as agility was concerned?

A. As far as I know, he performed it in a safe manner, what he has done all the times I have worked with him before.

Q. How about his ability to get around on cars, and things like that?

(Testimony of Herman F. Biwer.)

A. It was very good, sir.

Mr. Brobst: That is all.

(Witness excused.) [20]

GERALD E. RUTLEDGE

was produced as a witness in behalf of the Plaintiff and, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Brobst): Mr. Rutledge, what is your business or occupation, please?

A. I am employed by the Southern Pacific Railroad as a brakeman and conductor.

Q. How long have you been employed by the Southern Pacific Company?

A. 15 years in that capacity.

Q. In your experience as a conductor and brakeman in what kind of work have you been engaged? Just generally describe it.

A. Primarily freight work, with a big proportion of the time on local freight.

Q. What does that involve?

A. Switching and handling of cars, switching industry tracks, spotting cars, and doing maintenance-of-way work.

Q. In that connection do you have anything to do with the stopping of trains and train movements? A. Yes.

Q. How is that done?

A. The movement of trains, generally speaking,

(Testimony of Gerald E. Rutledge.)

is by signals, hand signals or lamp signals; sometimes by verbal instruction. [21]

Q. When signals are given who are the signals given to, or to whom are they relayed?

A. For the movement of a train or an engine they are given to the engineer generally.

Q. Most of your experience of 15 years has been in this vicinity, has it? A. Yes.

Q. That is around Klamath Falls?

A. Yes.

Q. Mr. Rutledge, is there any custom or practice with reference to the conduct of an engineer when one of the trainmen is in his view giving signals and when that trainman disappears from view? Is there any custom or practice relating to the conduct of the engineer?

A. Yes, there is a practice.

Q. What is that, please?

A. In switching, for example—I would have to give an example. In switching, where you can be seen by the engineer, the man immediately ahead of the engine or behind the engine, or closest to the engineer, gives the signal to proceed and stop and directs the movement of the engine. If that man who normally gives signals to direct the engine gets out of sight, there is no direction, no further direction for the engine, and it must stop. That is the practice.

Q. Now, in a move where a cut of cars or a train is being [22] moved some 75 car lengths or three-quarters of a mile to a mile to get in the

(Testimony of Gerald E. Rutledge.)

clear, what is the purpose or what would be the purpose of one of the trainmen riding on the front footboard of the engine for that distance?

A. There could be several purposes. I think that the circumstances directly involved in that particular movement would have to be known before you could determine the purpose.

Q. Well, if he rode out there would you state whether or not that was for some particular purpose?

Mr. Gearin: If he knows.

A. I would have to presume.

Mr. Brobst: Q. Let's put it another way. He is the head brakeman. Where does the head brakeman normally ride in a move of that kind?

A. In the cab of the engine I think would be the general place for him to ride.

Q. And if he doesn't ride in the cab of the engine who has authority to place him any other place?

A. The conductor or the engineer, or possibly both of them, by general understanding.

Q. Would you tell us who it is that stations the men on the train?

A. I am not quite sure of the question.

Q. Who stations the men, tells them where to be on the train as the movement is being made? [23]

A. The conductor.

Q. Now, Mr. Rutledge, did you have occasion to go down and look at this engine No. 2718 following October the 6th of 1952?

Mr. Gearin: Just a moment. We are going to

(Testimony of Gerald E. Rutledge.)

object to this on this ground and for this reason: There appears in the files and records of this case an interrogatory directed to the plaintiff and to her attorney to furnish the defendant with names and addresses of all persons having any knowledge of any material fact in connection with the death of Mr. Daulton. That interrogatory was never answered by plaintiff upon Mr. Brobst's representation to me that only certain individuals would be called, as they were the only ones that had any knowledge of the accident, and Mr. Rutledge's name was not furnished to me. I hate to be technical about this, but I think under the circumstances I have a right to make known our position.

Mr. Brobst: I am sorry, but it was an oversight if it was not furnished. If I didn't notify you, I will certainly not press it now.

The Court: There seems to be nothing before the Court.

Mr. Brobst: I might state this, your Honor. I interpreted the request as being for witnesses who were not employes of the company. That is the way I interpreted it. I may have been wrong. [24]

The Court: At least, I am not going to pass on it. Go ahead. Settle it among yourselves.

Mr. Brobst: Q. Now, when you are coming up to line a switch, Mr. Rutledge, where normally does the engine stop?

A. As close to the switch as possible—before reaching the switch, I should say.

Q. When does the trainman get off to line a

(Testimony of Gerald E. Rutledge.)

switch? I don't know if I can make it any clearer without leading a bit, and I don't want to do that. When does he get off?

A. As soon as the engine has come to a stop.

Q. In other words, he doesn't get off until the engine has stopped?

A. As a general practice, no.

Q. Did you know Mr. Daulton in his lifetime?

A. Yes, I did.

Q. Had you observed him in his work?

A. Yes, I have.

Q. Would you tell us how he was with reference to getting on and off moving cars and climbing around on cars, if you observed him doing that?

A. I think that he was probably as agile a man as there was working there. His general habits and movements were all very athletic; never any stumbling, never clumsy, about any of his movements.

Mr. Brobst: I think that is all. [25]

Cross Examination

Q. (By Mr. Gearin): Mr. Rutledge, if the head brakeman were in the cab of the locomotive the engineer would know where to stop in daylight as he approached a switch, would he not?

A. I would say that the engineer should see the switch in daylight, yes.

Q. Yes. He would know where to stop and he wouldn't necessarily depend or have to depend upon signals from the head brakeman?

(Testimony of Gerald E. Rutledge.)

A. He wouldn't necessarily have to depend on those signals.

Q. Right. Sometimes brakemen ride on the footboard when there is no necessity of their riding there; isn't that a fact?

A. I can only say that I wouldn't ride the footboard of an engine unless there was a desperate necessity for me to be there.

Q. The question is sometimes brakemen do it, don't they?

A. I think probably when they think there is a necessity, yes.

The Court: That answer is stricken. Answer the question.

Mr. Gearin: Read the question.

(Last question read.)

A. I can't say that they do. The answer would be no.

Q. One other question. This custom and practice that you talked about, that Mr. Brobst asked you about, you gave an [26] answer with reference to switching. That applies to switching or when you are shoving cars or pulling cars, or where there are cars ahead of the engineer you have to have someone out to act as the eyes of the engineer; is that correct?

A. That is the rule that you are speaking of. Custom and practice is one of those things—it is a positive assurance against a man falling when he is out of sight. When he is in sight, he can give

(Testimony of Gerald E. Rutledge.)

signals. When he is out of sight no one can know what kind of signals he might be giving. That is the custom and practice.

Q. You mean when there is a necessity for the brakeman to give signals Is that a fair statement, Mr. Rutledge? I will restate the question. The custom, usage, and practice to which you refer applies when a brakeman has to be out someplace to give a signal, doesn't it?

A. We are still talking about two things, I believe. The custom and practice would apply under any circumstances. The rule is what you allude to when you are shoving cars or around curves, and so forth. That is the rule.

Q. Is it your testimony, then, that the custom applies to all circumstances and to any brakeman at all, when he goes out of sight you stop?

A. When he is the man that is directing the movement.

Q. Then the custom and practice to which you refer applies to situations where the brakeman is directing the movement? [27]

A. Directing the movement or is preparing to direct a movement, preparing himself or getting in a position to direct a movement.

Q. Or to give a signal? A. Correct.

Q. If there is no necessity for the brakeman to direct the movement or give a signal, would you say that the custom and practice still obtains?

A. I think the crew as a whole look out for each other. The engineer would certainly watch any man,

(Testimony of Gerald E. Rutledge.)

whether he was directing the movement or whether he was just riding——

Mr. Gearin: Mr. Beckwith, will you read the question to the witness, please.

(Last question read.)

A. Yes.

Q. Can you answer that? A. Yes.

Mr. Gearin: I have no further questions.

Mr. Brobst: No further questions.

(Witness excused.) [28]

JOHN RUGER

was produced as a witness in behalf of Plaintiff and, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Brobst): Mr. Ruger, what is your business or occupation, please?

A. Brakeman for Southern Pacific.

Q. How long have you been employed by the Southern Pacific? A. 14 and a half years.

Q. So we will not waste any time, you were, I believe, the rear brakeman on this work train in the move that was being made at the time that Mr. Daulton was killed; is that correct?

A. I was.

Q. During that move where were you stationed?

A. I was standing on the lower step of the back of the caboose watching ahead. It was hot inside, so I stayed outside.

(Testimony of John Ruger.)

Q. You were standing outside? A. Yes.

Q. On which side would that be?

A. On the engineer's side.

Q. Were you on the step or down on the stirrup?

A. No, the lower step. I was on the lower step.

Q. As you rode along there could you see Mr. Daulton? A. Yes, all the time.

Q. About how far was the move that you were going to make? [29] For what distance were you going to move?

A. Oh, from 60 cars to 70 cars to get to the switch.

Q. Whose job was it to line the switch when you got up there? A. It was the head brakeman.

Q. That was Mr. Daulton?

A. Mr. Daulton.

Q. Where there any workmen along the track that you passed on the way down?

A. Well, a couple of fellows. I figured they were welders. They were not working at the time. They were standing off to the side.

Q. As you went down there what would you say would be the speed of the movement of the train at the time the accident happened, your best judgment on it?

A. Pretty slow; probably three or four miles, because we do that going into a switch. They don't try to go in there fast.

Q. As you were watching Mr. Daulton did he disappear from your view at any time?

(Testimony of John Ruger.)

A. Well, not until he got close to the switch. Then I must have looked someplace else. When I looked again he wasn't there, so I just automatically thought he was getting the switch.

Q. How long was that before the train stopped, that Mr. Daulton disappeared from your view? It would be about how [30] many car lengths or what distance, if you can remember?

A. Oh, three or four or five car lengths, maybe.

Q. Then it traveled along after that until it came to a stop; is that correct?

A. It wasn't very far. It is pretty hard to remember just how it was, but we were close to the block signal.

Q. Your best recollection is three or four or five car lengths? A. Yes.

Q. Now, Mr. Ruger, after the accident did you go up to the front of the engine at all?

A. No, I just—when the engineer motioned for me to come up I went up and took a look, and then I took off. I had to flag—there was a train due behind us, and I had to flag it right away, so I didn't go to the head end of the engine at all; just as far as the steps leading up to the cab.

Q. Then did you at a later time during the day look at the step in front of the engine?

A. Well, we was around that side for about two hours, and I was walking back and forth, but I never looked specifically at it because I didn't know what I was looking for. I was all over the train.

Q. Did you make any observations at all about

(Testimony of John Ruger.)

two hours later while you were there in the cut with reference to the right front footboard?

Mr. Gearin: We object, your Honor, on the ground and for [31] the reason the witness has already testified he didn't look specifically at the front of the engine.

The Court: Overruled.

A. Well, no, I didn't. I knew that there was one new one and one old one, there was one new board and one old one.

Mr. Brobst: Q. Did you observe anything with reference to the way that either one of them was fastened to the brackets?

A. No, I didn't at the time.

Q. Did you look at it?

A. Well, it was found afterwards——

The Court: Just a moment. Tell what you saw; not something else. You started off, "It was found." I don't know what that means.

Mr. Brobst: Q. All we want is what you actually saw. Did you actually look at it at a later date? A. At a later date, yes.

Q. When was it that you actually looked at it? When was it that you say later you looked at it?

A. Well, it wasn't more than two days.

Q. Can you state whether or not it was the same board that you saw a couple of days later that was on the front of the engine at the time the accident happened?

A. No, I couldn't tell. I don't pay very much attention to those things.

(Testimony of John Ruger.)

Q. When you saw it two or three days later what did you see [32] with reference to the bolts, if anything?

Mr. Gearin: An objection, your Honor, on the ground the witness has testified he couldn't even say if it was the same board. There is no testimony it was in the same condition as it was at the time of the fatal accident.

The Court: Overruled.

A. I don't know. I don't even notice those things. I work around them and I just never gave it a thought.

Mr. Brobst: Q. Mr. Ruger, did you do anything when Mr. Daulton went out of view of you, when you lost sight of him?

A. No, I didn't do anything. I didn't make any motion. I just saw he was gone. It was a common everyday occurrence, and I just waited for the block signals to change, and it didn't, and then I knew something was haywire.

Mr. Brobst: I have no further questions.

Cross Examination

Q. (By Mr. Gearin): Mr. Ruger, you were riding on the step of the caboose? A. Yes.

Q. The train was going ahead this distance and was going to stop at the switch at Wocus siding?

A. Yes.

Q. What necessity was there for you riding on the step and not inside the caboose? [33]

A. Well, when you are sliding into a siding the

(Testimony of John Ruger.)

rear man is responsible for lining up that switch. There was a slight curve, and I was just watching for the block signal to go red. I knew we were going in, and then I would get the switch behind.

Q. You would get the switch after the train had gone into the siding? A. Yes.

Q. Would you say the train came up very close to the siding when it stopped? A. Yes.

Q. You believed, then, after it stopped that the head brakeman would get off and go and line the switch?

A. Yes. It should have went red, but it didn't.

Q. Well, as you got near the crossing or the switch you looked someplace else, and then you looked back and Mr. Daulton was out of sight?

A. Yes.

Q. You didn't attach any particular significance then, did you, to the fact that Mr. Daulton went out of sight because you were so close to the switch; is that correct?

A. That was just usual, that he would be out of sight crossing over to get the switch.

Mr. Gearin: No further questions.

Mr. Brobst: I have no further questions.

(Witness excused.) [34]

EDWARD TEANEY

was produced as a witness in behalf of the plaintiff and, having been first duly sworn, was examined and testified as follows:

(Testimony of Edward Teaney.)

Direct Examination

Q. (By Mr. Brobst): Mr. Teaney, what is your business or occupation, please?

A. I am a switchman for the Southern Pacific.

Q. How long have you been employed by Southern Pacific? A. Since October the 4th, 1941.

Q. Where were you working back on October the 6th of 1952? A. Here in Klamath Falls.

Q. On that date did you learn that Mr. Daulton had been killed? A. I did.

Q. About what time did you hear that, if you can recall?

A. Well, it seems to me it was around 4:00 to 5:00 o'clock.

Q. Were you on duty at the time? A. No.

Q. When you heard that did you come on down to the yards then?

A. Yes, I did, very shortly.

Q. When you got down to the yards did you see the engine that was involved in the accident?

A. The engine?

Q. Yes. [35]

A. Not at that time; no, sir.

Q. When did you see the engine that was involved in the accident? A. The next morning.

Q. What time was that?

A. Oh, approximately 9:00 o'clock.

Q. Who was with you, if anyone?

A. Mr. Zimmerman was with me.

Q. At that time did you examine the footboard on the engine? A. I did.

(Testimony of Edward Teaney.)

Q. Will you just tell us what you saw.

Mr. Gearin: We object, your Honor, on the ground and for the reason it is not shown that the condition as Mr. Teaney saw it the next morning was the same or similar to the conditions as they existed at the time of the accident.

The Court: Overruled.

A. Well, we went down to the roundhouse——

The Court: You were not asked what somebody else saw. What did you see?

A. I went down to the roundhouse and found this engine in the roundhouse, and the footboards had protruding bolts on them.

Mr. Brobst: Q. Which footboard was that, the right or left? A. The right one. [36]

Q. How much did it protrude? Just describe what you saw.

A. Well, it was sticking up, I would say, approximately three-eighths of an inch above the level of the board.

Mr. Brobst: I appreciate the fact that these pictures were taken about a year later, but this Plaintiff's Exhibit B, I will ask that you show that to the witness.

Q. Now, Mr. Teaney, looking at that picture, I will ask you this: Is that picture a correct representation of the appearance of that board on the morning that you saw it?

Mr. Gearin: We object to the form of the question.

(Testimony of Edward Teaney.)

The Court: That doesn't give me much of an idea——

Mr. Gearin: It is leading, your Honor. I submit it is leading.

The Court: Sustained.

Mr. Brobst: Q. Mr. Teaney, what does that picture show? A. It shows a bolt sticking up.

Q. Would you state whether or not that bolt sticking up is the same as you observed on the morning that you saw the footboard of that engine down in the roundhouse?

A. I would say it is.

Q. What about the other bolts shown in the picture? A. What do you mean?

Q. Would you just describe how they are set in there, in the running board?

A. Well, they are countersunk. They are not all the way down. [37]

Q. Is that the way they appeared when you saw it the morning that you saw the footboard?

A. Yes.

Mr. Brobst: I will ask, your Honor, that that picture be admitted into evidence as a plaintiff's exhibit.

Mr. Gearin: Same objection, your Honor, it being my position it is not shown that was the footboard that was on the engine at the time of the accident, or that it was similar or had any similarity whatsoever to the one that was on at the time of the accident.

The Court: Oh, that is a different matter. You

(Testimony of Edward Teaney.)

didn't think that objection before. I think it is a proper objection to the introduction of the picture. I think the time and place has to be shown, and whether it was a picture of an object which has any connection with the case. Objection sustained.

Mr. Brobst: Q. You were not present when the picture was taken, were you? A. No, sir.

Q. You don't know when it was taken?

A. No.

Q. Is there any similarity between the footboard as shown in the picture and the footboard that you saw the morning after the accident happened?

A. This picture here? [38]

Q. Is there any similarity between them?

A. Yes.

Q. Will you just tell us what that similarity is.

A. Well, those bolts were protruding just like in this picture, and I would say approximately the same distance as shown here. Also it was very grimy.

Mr. Brobst: May I make another offer of the picture, your Honor?

Mr. Gearin: I would like to see it again, if I may, your Honor. We have a further objection, your Honor, that it is not shown this is a picture of the locomotive that was involved in the accident. I think Mr. Brobst will agree with me that this picture was taken in December of 1953.

Mr. Brobst: That is correct. There is no question about that.

The Court: Objection sustained.

(Testimony of Edward Teaney.)

Mr. Brobst: Q. Mr. Zimmerman was with you at the time that you saw this board?

A. Yes, he was.

Q. Did you say what the time was the next day that you saw it?

A. Approximately 9:00 o'clock.

Q. What was the condition of the footboard on the other side of the engine?

A. The condition of the footboard on the opposite side? [39]

Q. Yes.

A. Well, I don't remember distinctly.

Q. Was it in the same condition as the one was in on the right-hand side? A. No.

Q. What was the difference?

A. Well, I don't remember it being in as bad a shape as the one was. That is all the difference I remember right now.

Mr. Brobst: I have no further questions.

Cross Examination

Q. (By Mr. Gearin): Mr. Teaney, you are the brother of the plaintiff in this case, are you not?

A. Yes, sir.

Q. You went down to see that footboard about 9:00 or 10:00 o'clock the next morning; is that about right? A. Yes.

Mr. Gearin: I have no further questions.

Mr. Brobst: That is all.

(Witness excused.) [40]

ROBERT B. ZIMMERMAN

was produced as a witness in behalf of Plaintiff and, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Brobst): Mr. Zimmerman, what is your business or occupation, please?

A. I am a switchman for the Southern Pacific Company.

Q. How long have you been employed by the Southern Pacific Company? A. 18 years.

Q. Mr. Zimmerman, did you have occasion to go down and look at Engine No. 2718, I believe it was, the morning of October 7, 1952?

A. Yes, sir.

Q. Who was with you?

A. Mr. E. C. Teaney.

Q. How did you happen to go down and look at the footboard on the engine?

A. I am the local chairman of the Brotherhood of Railroad Trainmen, and Mr. Teaney called me and asked me to accompany him to inspect the engine.

Q. When you got down there, just tell us what you saw with reference to the front footboards on Engine 2718.

Mr. Gearin:: The same objection, your Honor, for the purpose of the record. [41]

The Court: Overruled.

A. The front footboard on the engineer's side—that would be the right footboard—the bolts were

(Testimony of Robert B. Zimmerman.)

not completely countersunk, and there was a bolt approximately in the center of the footboard that was sticking upward about three-eighths or a quarter of an inch.

Q. What was the condition of the board generally with reference to any foreign material or anything else that might have been on it?

Mr. Gearin: We object to that, your Honor, on the ground and for the reason there is no charge made there was any foreign material on the footboard. The only charge is that contained in the pre-trial order——

Mr. Brobst: Your Honor, I am not using it for the purpose of—it is just to show that it was a used board as distinguished from a new one.

Mr. Gearin: We object to that on the ground of immateriality, then.

The Court: He may describe the condition of the board. The question is rejected as leading.

Mr. Brobst: Q. Would you describe the board, Mr. Zimmerman, with reference to being old or new.

The Court: Just a moment. Strike that question. Just tell the condition of the board as he saw it without any suggestion from counsel as to what it might be. Go ahead. [42]

A. The board was dirty. I mean it showed evidence of being well-worn. The only thing wrong with it that I saw was the bolts, and it showed evidence of being in use for some time.

Q. How about the running board on the other side, on the fireman's side?

(Testimony of Robert B. Zimmerman.)

A. Do you mean the footboard?

Q. Yes, the footboard.

A. The footboard, as I recall, on the fireman's side was fairly new.

Q. Now, Mr. Zimmerman, has most of your experience been around here in this area?

A. Yes, sir.

Q. What types of work have you done generally?

A. Helper on switch crews and engine foreman, and two months as a brakeman.

Q. In your experience in working around engines, would you tell us in what distance the movement of an engine with, I believe it is, four cars, two K&J cars, a ditcher, and caboose, traveling at from two to four miles an hour, could be stopped?

Mr. Gearin: We object, your Honor, on the ground that the witness is not qualified, and on the further ground that the premise of the question is wrong because there were more cars than that. Furthermore, it was not shown whether the cars were empty or loaded. Also, the man is not shown to have any experience on that subject. [43]

The Court: I think that is correct. I don't think he has had any experience to qualify him to answer.

Mr. Brobst: Q. Mr. Zimmerman, assuming empty cars—I don't have the exact consist of it, but I believe there were two K&J cars, a ditcher, caboose, and a spreader. The K&J cars were empty, and the ditcher and the other one I don't believe carried a load. Assuming that condition—I will ask

(Testimony of Robert B. Zimmerman.)

this preliminary question: Do you know the track out at Wocus, in the vicinity of where this accident occurred? A. Yes, sir.

Q. Are you familiar with the grades there?

A. Yes, sir.

Q. Assuming that the move is being made, then, in a northerly direction or railroad direction east, traveling at between two and four miles an hour, in what distance could that movement be stopped on a stop signal?

A. It could be stopped within a few feet, almost immediately.

Mr. Gearin: Just a moment, please. We object, your Honor. The witness is not shown to be qualified.

The Court: He has worked around trains. It is a question for the jury. Ladies and gentlemen of the jury, I think that this witness has shown no particular qualifications, any more than you and I would have about this, but he has seen trains in operation, perhaps, and under those circumstances I will permit him to answer. But you should take into consideration [44] his statement about his experience.

Mr. Brobst: Q. In what distance?

A. He could stop within a few feet, or almost immediately.

Q. Now, Mr. Zimmerman, is there any custom or practice relative to what an engineer should do when one of the trainmen that is in his vision dis-

(Testimony of Robert B. Zimmerman.)

appears from view? Is there any custom and practice as to what the engineer should do?

A. Yes, sir. He should stop.

Q. How long have you worked in this part of the country?

A. Practically all my experience has been at Klamath Falls, with the possible exception of about six months.

Q. That is, in all types of train movements?

A. Yes, sir.

Q. Assuming that there is this work train that consisted of a number of cars that have been described to you, and they are ordered to make a move to get into the clear, in your experience what would be the purpose of the brakeman riding out on the front footboard of the engine for that distance of a mile to three-quarters of a mile?

A. He would be directing the movement up to the switch point.

Q. Mr. Zimmerman, assuming that he had no duties such as that, where would he normally ride?

A. In the cab of the engine.

Q. Who has control of the position of the men on a train when a move of that kind is being made?

A. Well, the engineer would have up on the head end.

Mr. Brobst: I have no further questions.

Cross Examination

Q. (By Mr. Gearin): Mr. Zimmerman, you say that the brakeman, assuming he was out there,

(Testimony of Robert B. Zimmerman.)

would be directing the movement, according to your testimony? A. Yes, sir.

Q. Would that be the only purpose of his being out there?

A. Well, I can't think of any particular purpose for him to be riding out there unless he was up there to give signals.

Q. What signals would be give?

A. Stop signals and come-ahead signs.

Q. His purpose would be to line the switch at the siding? A. That is right.

Q. If he were in the cab of the locomotive, the locomotive would go up to the switch, stop, and he would get down and line the switch and the train would proceed into the siding?

A. That is right.

Q. Then if he were riding in the cab of the engine there would be no necessity for him either to give a signal or to direct the movement, would there?

A. Not if he was in the cab of the engine.

Q. No. We are assuming now a condition of daylight, and the block signal and switch the engineer can see from the [46] cab, can't he, and he knows when he is coming to the siding, doesn't he?

A. Yes.

Mr. Gearin: That is all.

Mr. Brobst: That is all.

(Witness excused.)

TED T. WILLIAMS

was produced as a witness in behalf of Plaintiff and, having bein first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Brobst): Mr. Williams, what is your business or occupation, please?

A. Conductor and brakeman for the Southern Pacific Company.

Q. How long have you worked as conductor and brakeman for the Southern Pacific Company?

A. Brakeman since January, 1937, and conductor since May, 1945.

Q. Where principally have you been employed, in what division? A. The Shasta Division.

Q. What does that include?

A. Includes between Gerber and Crescent Lake.

Q. In your work what type of work have you done? Would you just describe it generally, and what that includes, both as brakeman and as conductor?

A. I have held an assignment as brakeman at present between Klamath Falls and Crescent Lake, and I have held various jobs as conductor for a short period of time.

Q. When you are in the yard and on the road what do you do with reference to your train if you are acting as a brakeman?

A. Well, you have to watch out for signals, take care of any switching movements that might come up. [48]

(Testimony of Ted T. Williams.)

Q. Whom do you give signals to, if anyone, in such movements?

A. Well, you give them to the engineer or another brakeman to pass on to the engineer, or another member of the crew.

Q. How about when trains are going to be stopped or coupled, who gives those signals?

A. Well, either the brakeman or sometimes the conductor.

Q. Have you had occasion to stop trains and stop the movement of trains? A. Yes, sir.

Q. On how many occasions?

A. Oh, on numerous occasions. I couldn't mention the amount.

Q. Is there any custom or practice, Mr. Williams, with reference to what an engineer should do when a trainman is in his view and the trainman disappears and he is riding on the train that the engineer is operating?

A. Oh, he should stop immediately.

Q. Are you familiar with this section of track out here by Wocus where this accident occurred?

A. Yes, sir.

Q. How many times have you been over it?

A. Oh, I would say on the average 40 times a month.

Q. Now, assuming a train out there consisting of an engine, two K&J cars, a ditcher, a spreader, and a caboose, traveling north or railroad east, at a speed of between two and four miles an hour, in what distance could that be stopped? [49]

(Testimony of Ted T. Williams.)

A. Well, it should be able to stop——

Mr. Gearin: The same objection, your Honor.

The Court: No, I think that this witness has indicated that he has had sufficient experience.

A. It should be able to stop in between four to six feet at three miles an hour, if the equipment is in first-class shape.

Mr. Brobst: Q. Now, Mr. Williams, did you ever examine the front footboards on Engine 2718?

A. Yes, sir; I did.

Q. When was it that you looked at them?

A. It was approximately a week after the accident.

Q. Where was the engine at that time?

A. It was parked next to the roundhouse, by the steam rack.

Q. Was anyone with you when you examined the footboards?

A. No, sir; there wasn't.

Q. Will you just tell us what you saw when you examined the footboard. Just describe everything that you saw.

Mr. Gearin: An objection, your Honor, as too remote.

The Court: When was this?

Mr. Gearin: A week later, he said.

The Court: I will permit the answer, and then we will see.

A. On the fireman's side of the engine apparently the footboard had been replaced. On the engineer's side, in about the center of the footboard,

(Testimony of Ted T. Williams.)

there was a bolt protruding—I [50] couldn't say what distance, but it was on the top of the footboard.

Mr. Brobst: Q. Anything else you observed about the board?

A. No, although it was greasy, and had a good deal more grease on it than the one on the other side, on the fireman's side.

Mr. Brobst: I wonder if I could show this witness Plaintiff's Exhibit B.

Q. Mr. Williams, I appreciate the fact that that picture was taken about a year after the accident, but I will ask you if you can recognize that. What does it represent as far as you can see there?

A. Well, the head of the bolt on this footboard is protruding beyond the footboard.

Q. Does it look like or is it a fair representation of what you saw out there when you examined No. 2718 back in October of 1952?

Mr. Gearin: Objected to as leading, your Honor.

The Court: Sustained.

Mr. Brobst: Q. Is there any similarity between that picture and what you saw back in October of 1952?

A. I would say there was a similarity, yes.

Q. Is it a fair representation of what you saw?

Mr. Gearin: Objected to as leading. [51]

The Court: Sustained.

Mr. Brobst: Q. Is there anything in that picture that is different from what you saw back on October 6, 1952?

(Testimony of Ted T. Williams.)

A. No, I can't say that there is.

Mr. Brobst: I would like to offer the picture in evidence, your Honor.

The Court: You can't bring a picture in on that kind of evidence, counsel. The picture has to stand on its own merits, and it has to be determined whether or not it was a picture of what the conditions were at the time it was taken.

Mr. Brobst: Q. Can you recognize what that is a picture of?

A. That is a picture of a hog, what we call a hog engine, of the same class as the 2700 class.

Mr. Brobst: That is all. I can bring the man who took it. I have no further questions at this time.

Cross Examination

Q. (By Mr. Gearin): Mr. Williams, you are what they call a griever?

A. No, sir; no more.

Q. You have been?

A. I have been; yes, sir.

Q. All right. You say it is the duty of the brakeman to give signals or the conductor to give signals to stop?

A. Under certain circumstances, yes.

Q. Assuming these facts, that in daylight there is going to [52] be a switching movement into a siding and the switch and the signal are in plain sight, what necessity is there for the conductor or the brakeman to tell the engineer where to stop with reference to the switch?

(Testimony of Ted T. Williams.)

A. There is none.

Mr. Gearin: I have no further questions.

(Witness excused.)

(Short recess.) [53]

AUSTIN RICHARD HAYDEN

was produced as a witness in behalf of Plaintiff and, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Brobst): Mr. Hayden, what is your business or occupation, please?

A. Yard man, Southern Pacific Company.

Q. How long have you been employed by the Southern Pacific Company?

A. A little over 18 years.

Q. And where principally do you perform your duties?

A. Here in the Klamath Falls yard.

Q. What is the general nature of your duties?

A. Making and breaking up the trains and spotting industry cars.

Q. Do you have anything to do with the starting and stopping of trains? A. Yes.

Q. How often do you do that in the course of a day?

A. Maybe 200 to 300 times a day.

Q. Mr. Hayden, are you familiar with the track out by Worus where this accident happened?

(Testimony of Austin Richard Hayden.)

A. Not too familiar. That is outside the yard.

Q. Your work is mostly in the yard; is that correct? A. In the yard. [54]

Q. What generally do you do as far as trains are concerned?

A. We switch trains. Maybe a 100-car train comes in here and we segregate the boxcars from one track to another.

Q. Did you have occasion to examine the footboard on Engine 2718 following the happening of the accident in which Mr. Daulton met his death?

A. Yes, I did.

Q. When was it that you examined the footboard on that engine?

A. As nearly as I can remember, it was two or three or four days after the accident.

Q. What was the occasion for your going down there and examining the footboards?

A. I am an officer in the Brotherhood of Railroad Trainmen, and Mr. Teaney was a member of our lodge, and he asked me if I wouldn't go down and look.

Q. When you examined the footboards on 2718 will you tell us what you saw.

Mr. Gearin: We object, your Honor, on the same ground, as being too remote.

The Court: Overruled.

A. Right in the middle of the right front footboard was a bolt that came up through the footboard, and it was protruding above the level of the wooden part, oh, maybe a quarter of an inch. I

(Testimony of Austin Richard Hayden.)

didn't measure it. And then over on the end where [55] the two bolts tie onto the angle bar that holds the wooden part of the footboard, they were not completely countersunk.

Q. How were they with reference to the board surface of the footboard?

A. Well, the one in the middle was up much higher than the ones over on the end. The one in the middle of the footboard was sticking up—well, where the flange on the bolt was it was above the wooden part.

Q. Now, in making switching movements around the yard here at Klamath Falls how far do you have occasion to travel on trains in making your movements?

A. It varies from day to day. Some days we do considerable traveling, and some days we are on what we call the lead, and we won't go a very great distance at all; maybe just in an area of a half a mile, and back and forth. And other times, why, we go clear out to what we call Chelsea, which I am just roughly guessing is maybe three or four miles.

Q. Now in making your moves like that are there any occasions when a brakeman rides on the footboard of the engine in making moves around the yard?

Mr. Gearin: We object, your Honor, on the ground and for the reason that Mr. Hayden's activities have been confined as a yard man to the yard. It would be entirely immaterial and incompetent. [56]

(Testimony of Austin Richard Hayden.)

The Court: Yes. And besides, I don't think he could testify to the state of mind of some other person, which is practically what this amounts to.

Mr. Brobst: Q. Is there any difference between conducting a move in the yard and out on the road?

A. Not switching moves.

Q. Are they the same whether they are in the yard or on the main line?

A. Comparatively so.

Q. Do you yourself ride on the front footboard of an engine?

The Court: I think that is entirely immaterial.

Mr. Brobst: Q. Who has control of placing the men, the switching crew, on the train? Who tells you where to go?

Mr. Gearin: We object to that, your Honor. This wasn't a switching movement. It would be entirely immaterial what they do on other types of movements.

The Court: Objection sustained. You have already testified on this subject.

Mr. Brobst: I want to show him Plaintiff's Exhibit C.

Q. Now, Mr. Hayden, is there any similarity between that picture there, as to what it shows with reference to the footboard, and what you saw out there two or three days after the accident had happened?

Mr. Gearin: An objection, your Honor.

The Court: What is your objection? [57]

(Testimony of Austin Richard Hayden.)

Mr. Gearin: My objection is on the ground that, first of all, it is not properly identified.

The Court: Objection sustained.

Mr. Brobst: Well, the picture, your Honor, speaks for itself.

The Court: I know, but it is not in evidence.

Mr. Brobst: That is right. All right.

Q. You were not there when that picture was taken, were you? A. No.

Mr. Brobst: That picture was taken about a year after the accident. May I withdraw this witness, your Honor, and see if I can tie these pictures in.

(Witness withdrawn.) [58]

GERALD E. RUTLEDGE

was recalled as a witness in behalf of the plaintiff and was further examined and testified as follows:

Direct Examination

Q. (By Mr. Brobst): Mr. Rutledge, will you look at those three pictures that were just handed to you by the Bailiff. Look at all three of them. Were you present when those pictures were taken?

A. Yes, I was.

Q. Who was the photographer that took those pictures?

A. A man working out of Mr. Guderian's establishment.

Q. Do you recall his name?

(Testimony of Gerald E. Rutledge.)

A. V. A. McMillan.

Q. When were they taken?

A. I couldn't tell you the exact date.

Q. What is your best judgment as to the date?

A. I only recall it was several months after the date of the accident.

Q. They were taken by Mr. McMillan, of Mr. Guderian's office or photographic establishment; is that right? A. Yes, sir.

Q. They are pictures of what?

A. Generally they are pictures of the front end of Engine 2718, as identified by the number plate.

Q. At the time the pictures were taken did you observe the [59] footboards on the engine?

A. Yes, I did.

Q. Would you state whether or not those pictures represent the condition as you saw it when the pictures were taken?

A. Yes, they are representative of what I saw.

Mr. Brobst: That is all.

Cross Examination

Q. (By Mr. Gearin): Mr. Rutledge, as a matter of fact, those photographs were taken in the month of December of 1953, were they not?

A. It could be possible.

Mr. Gearin: That is all.

(Witness excused.)

Mr. Brobst: Now, your Honor, I would like to offer them in evidence as Plaintiff's Exhibits A, B and C.

Mr. Gearin: We object on the ground of remoteness, your Honor.

The Court: I think that remoteness alone is not an absolute objection. As I understand, there was some suggestion that the plaintiff might have to show that the conditions of the footboard were the same. I don't know whether there is any proof to that effect at the present time in the case.

Mr. Brobst: The only testimony, your Honor, is of other witnesses who testified that they are representative of the [60] condition that they saw, and the witness who testified he examined the board the next day has testified that those represent the way the board looked when he saw it the next day. There may be some question of weight, but I think that they are admissible. The weight of them, perhaps, is for the jury. I appreciate the fact they were taken a considerable time afterwards, but it is the best we could do.

The Court: It is my idea that there may be some proof that the conditions were the same. My rulings so far have been based upon the proposition that the pictures themselves would have to be introduced before you made any particular examination into the matter. However, there was an examination of these witnesses which was not objected to, and they testified that the condition was approximately the same. In view of that situation, I will admit the pictures.

(The photographs above referred to were received in evidence as Plaintiff's Exhibits A, B, and C, respectively.)

The Court: Ladies and gentlemen of the jury, of course this is a very serious issue in the case. I am admitting the pictures so that you will have everything before you that bears upon the question. But you must keep in mind that these pictures were taken a year later, and you must make up your minds as to whether the conditions were the same or not. In order to make up your minds as to that, you will [61] have to consider the testimony of the various witnesses that you hear in the case. I am admitting them not for the purpose of proving anything except that they are here, and the taking has been established, and there has been some testimony that the condition within two or three days after was the same.

You may proceed.

AUSTIN RICHARD HAYDEN

was recalled as a witness in behalf of Plaintiff and was further examined and testified as follows:

Direct Examination—(Continued)

Q. (By Mr. Brobst): Now, Mr. Hayden, will you look at Plaintiff's Exhibit B, I believe it is. Does that picture show the condition of the board at the time that you examined it a day or two after the accident?

Mr. Gearin: Again we object, your Honor, as leading.

The Court: Of course, that is true.

Mr. Brobst: I am a little at a loss to know how to frame it.

Q. Is there any similarity between that picture

(Testimony of Austin Richard Hayden.)

and the condition that you saw two or three days after the accident? A. Yes.

Q. What is it?

A. This bolt in the middle of the footboard is as I saw it. [62]

Mr. Brobst: I wonder if we could have him mark that bolt. Your Honor, could we have the witness circle it? That should be marked with an H-1, so we know he is the one that identified the mark.

(The witness marked on the photograph as requested.)

Mr. Brobst: Q. Now is there anything in that picture, Mr. Hayden, that was not there at the time that you examined the footboard after the accident? Do you notice anything on that footboard or anywhere there that wasn't there?

A. Could that question be repeated again?

Q. I will put it this way: Is there any difference between that picture and the condition of the running board as you saw it immediately following the accident?

A. I don't notice any difference.

Q. Have you observed other running boards on other engines there in the yard of that same class?

A. Yes.

Q. And how are the bolts on the running boards of the other engines as far as you have observed them?

Mr. Gearin: An objection as immaterial, your Honor.

(Testimony of Austin Richard Hayden.)

The Court: Objection sustained.

Mr. Brobst: I have no further questions. [63]

Cross Examination

Q. (By Mr. Gearin): Mr. Hayden, you didn't make an inspection of the front of this locomotive the day that Mr. Daulton was killed, did you?

A. No, I didn't.

Q. And it was two, three, or four days later that you saw it?

A. As nearly as I can remember.

Q. Could it have been as much as five days?

A. I just can't remember. But Mr. Teaney left word for me to see him, and I had no idea what he wanted, but it was just a day or two, and he was trying to get hold of me, and he finally got hold of me. I just couldn't say, it happened so long ago.

Mr. Gearin: That is all. Thank you.

(Witness excused.) [64]

THOMAS C. WARMACK

was produced as a witness in behalf of Plaintiff and, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Brobst): Mr. Warmack, what is your business or occupation, please?

A. Locomotive engineer for the Southern Pacific Company.

Q. How long have you been an engineer?

A. About 14 years.

(Testimony of Thomas C. Warmack.)

Q. You are employed in what division of Southern Pacific Company?

A. I work on the Shasta Division.

Q. Does that include Klamath Falls?

A. It does.

Q. Are you familiar with the stretch of track out there by Wocus where this accident happened?

A. I am.

Q. How many times have you been over that particular section of track?

A. Oh, about six or eight times a week for the past eight years.

Q. Now, Mr. Warmack, assuming a train consisting of an engine, two K&J cars that are empty, a spreader, a ditcher, and a caboose, traveling at between two and four miles an hour, in what distance could that move be stopped out on the stretch [65] of track where this accident happened?

Mr. Gearin: We object to the form of the question, your Honor. There is no testimony in the record that the cars were empty, that the cars to which counsel referred were empty.

Mr. Brobst: Is there a dispute about it?

Mr. Gearin: I don't know whether they were or not.

Mr. Brobst: I suggest we can call one of the witnesses back.

Mr. Gearin: I don't want to delay the matter, your Honor. Subject to his tying it up later I will withdraw the objection. Is that O.K.?

(Testimony of Thomas C. Warmack.)

Mr. Brobst: Yes, that is all right.

Mr. Gearin: Because I don't know whether they were empty or full.

A. If the braking equipment was in first-class shape, it could be stopped in anywhere from six to eight feet.

Mr. Brobst: Q. Let's take it the other way. Let's assume that the two cars were loaded. Would that make any difference?

A. Oh, probably a couple of feet.

Q. Just a matter of a couple of feet difference?

A. There wouldn't be much difference if all the braking equipment was in first-class shape.

Q. Now, Mr. Warmack, is there any custom and practice in this division relative to what an engineer should do in the event that a brakeman is riding on the front footboard of the engine [66] and disappears from the engineer's view?

A. The customary practice any time a brakeman disappears from your view you should stop, if you are not certain as to where he is; or if he is not where you can see him, why, you are not certain.

Q. You must stop when he is where you can't see him?

A. You are required by the rules to——

Q. Now, as an engineer, when a move is being made for three-quarters of a mile, do brakemen generally ride out on the front footboard of the locomotive? A. No.

(Testimony of Thomas C. Warmack.)

Q. What would be the reason for a brakeman to be out on the front footboard of the engine?

A. Well, I wouldn't know of any under that circumstance.

Q. Where does he ride if he has no duty to perform, the head brakeman?

A. In the engine.

Q. Who is the one that is to tell him where to ride?

A. Usually the one which is closest to him, which is the engineer, notwithstanding the fact that the conductor has the authority to place his men any place he so desires.

Q. But the usual thing is whoever is closest to him normally does it; is that right?

A. If he is assigned to the head end, then ordinarily he abides by the engineer's instructions while around the engine. [67]

Q. When you are approaching a switch and the brakeman is out on the front footboard, does the brakeman have anything to do with the movement of the train?

A. Well, he doesn't really have anything in particular to do with movement of the train. The engineer ordinarily in that short a distance could tell where to stop. It is a practice sometimes if he is there to give you a stop signal, but oftentimes when he gets a signal you don't know whether he is stopping for a switch or what the condition is. If the signal is given you abide by it.

Q. But you keep him in view all the time?

(Testimony of Thomas C. Warmack.)

A. It is a good practice.

Q. What kind of signals would he give out there as you approached the switch? What kind of signals, if any, would a brakeman give as you approached a switch out there that he was going to line?

A. If you are still moving, he probably would give you a stop signal.

Q. How is that given?

A. Well, if he was standing on the front footboard, why, he would wave his hand in a position like this, which would indicate a stop signal.

Q. Where normally does the engine stop with relation to the switch itself?

A. Oh, generally anywhere from eight to ten feet, and a [68] short train like that it is much easier to stop at a point where you want, within a foot or two, even, for that matter.

Q. You stop right close to the switch?

A. Ordinarily, yes.

Q. Then what does the brakeman do when the stop is made?

A. He gets off the engine and lines the switch.

Q. And then when is the move started again?

A. When he gives a proceed signal. If you are close to the switch, it would be impossible for the engineer to see if the switch points met up properly. Therefore, a move is not supposed to start until such time as it is known that the switch points have met up properly to save a derailment. The brakeman being there, he would be the one to give

(Testimony of Thomas C. Warmack.)

you a come-ahead sign after that has been ascertained.

Mr. Brobst: I think that is all.

Cross Examination

Q. (By Mr. Gearin): Mr. Warmack, in response to a question by Mr. Brobst with regard to the custom and practice, you say that is the rule about stopping when a brakeman goes out of sight?

A. Well, I think there is a rule in the book that requires you to stop when a person is giving a signal, when they vanish from view and you can't see the signal.

Q. All right. That is Rule 7-B of the rules and regulations of the Transportation Department, with which you are undoubtedly [69] familiar, aren't you? A. Yes, sir.

Q. And that rule provides—and I know you will correct me if I am wrong—that in backing an engine or cars, or shoving cars ahead of the engine, the disappearance from view of a trainman or the light by which signals controlling the movement are being given, must be construed as a stop signal. That is the matter to which you referred, is it not?

A. I don't know if they were shoving cars or what not. That is the matter I referred to. You are right.

Q. Now, sometimes brakemen ride out on the front step without any necessity therefor, don't they? A. Well, yes.

(Testimony of Thomas C. Warmack.)

Q. All right. And if you are an engineer and it is daylight and you are going up to a switch where they have a block signal, you don't have to have a brakeman out on the front step to tell you where to stop if you have a short train, do you?

A. No.

Q. In fact, he doesn't have to be out there?

A. No.

Q. He could be riding in the cab if he wanted to be, couldn't he? A. Yes.

Mr. Gearin: That is all. [70]

Redirect Examination

Q. (By Mr. Brobst): Mr. Warmack, if the brakeman is riding out there and in your view and suddenly disappears, what do you do?

A. Well, according to conditions—ordinarily I would stop. There is another rule in the book that covers that.

Q. In other words, that is the customary thing to do, and that is what they do, isn't it?

A. Well, yes, by complying with Rule 108 you are required to do that.

Q. Rule 108 is in case of doubt or uncertainty a safe course must be taken?

A. Right. If you can't see him, you don't know where he is, so you stop.

Q. That is the rule, and that is the foundation for your custom and practice when a man disappears? A. That is right.

Mr. Brobst: I have no further questions.

(Testimony of Thomas C. Warmack.)

Recross Examination

Q. (By Mr. Gearin): Mr. Warmack, if a man is out there in front on the step, and you are approaching a block signal, where do you have to keep your view, on the brakeman, or do you have to watch the block signal?

A. Well, if he is on the front step and you are looking at [71] the block signal you probably can see both of them.

Q. I didn't hear that.

A. I say, if he is on the front step of the engine and you are approaching a block signal, it wouldn't be very difficult to see both of them.

Q. The point is, what do you concentrate on? The block signal, isn't it? A. Safety.

Mr. Gearin: Yes. That is all.

Redirect Examination

Q. (By Mr. Brobst): You concentrate on safety?

A. That is right.

Q. How does the block signal change? What causes it to change? Let's put it that way.

A. If the switch is open, the block signal will go in a stop position if the train is approaching the switch. If there was a train already beyond that signal, extending between the switch and the siding—this train might have gone beyond the siding, and the signal would have already been red. Therefore, the switch would not have any material effect on it at all.

Mr. Brobst: I have no further questions. [72]

(Testimony of Thomas C. Warmack.)

Recross Examination

Q. (By Mr. Gearin): What would happen if you ran through a block signal?

A. You usually get fired.

Mr. Gearin: That is all.

(Witness excused.)

Mr. Brobst: I wonder if I could recall Mr. Williams. [73]

TED T. WILLIAMS

was recalled as a witness in behalf of Plaintiff and, having been previously duly sworn, was further examined and testified as follows:

Direct Examination

Q. (By Mr. Brobst): When was it, Mr. Williams, that you saw the running board of the engine, No. 2718, with reference to the date of the accident?

A. It was either the following Sunday or Monday.

Q. Would you look at Plaintiff's Exhibits A, B and C, and tell me if there is anything in those pictures which you see there now that was not present at the time you made your observations of those running boards.

A. The latter picture I have here in my hand, if this is the engine on my left, that is an unusual type of board.

Q. The one on the left?

A. This is an unusual board.

(Testimony of Ted T. Williams.)

Q. Do you see anything different on the right running board at all?

A. No, I don't. I don't see any difference.

Mr. Gearin: Counsel, may I inquire the number of the photograph to which Mr. Williams referred?

Mr. Brobst: Exhibit A. Exhibit A shows the left running board?

A. Yes, sir; the left-hand side; yes. [74]

Q. With reference to the bolts in the running board on the right running board, do you notice any difference in their condition from the time that you saw it and as represented there in the pictures?

A. No, there don't seem to be. It seems to be the same.

Q. Now, when the brakeman is out on the running board and you are approaching a switch, customarily and under ordinary working conditions would the brakeman give any signals?

Mr. Gearin: Your Honor, this has been gone into before. I hate to object——

Mr. Brobst: Not by this witness.

The Court: The question is one of cumulative testimony. You have gone into that a good many times. It is the custom of this Court to have only three witnesses on a point, but as counsel is probably not acquainted with that, I won't insist; but I suggest you limit your examination to testimony that is not cumulative.

Mr. Brobst: I will withdraw it. That is all. I have no further questions.

Mr. Gearin: No further questions.

(Testimony of Ted T. Williams.)

(Witness excused.) [75]

ROBERT LUCE

was produced as a witness in behalf of Plaintiff and, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Brobst): Mr. Luce, what is your business or occupation, please?

A. Engineer and fireman on the Southern Pacific.

Q. How long have you been an engineer and fireman for the Southern Pacific?

A. Approximately 14 years.

Q. What division are you attached to?

A. The Shasta Division.

Q. What territory does that include?

A. Klamath Falls to Dunsmuir, Dunsmuir to Gerber, and Klamath Falls to Alturas.

Q. What type of work have you done generally?

Q. Would you rephrase that, please?

Q. What type of work do you do generally with the trains?

A. Well, firing and running locomotives, whichever job I am called for.

Q. Do you have anything to do with switching and road work, riding engines, and things of that kind? A. Yes, we do.

Q. Have you yourself operated Engine 2718?

(Testimony of Robert Luce.)

A. I have. [76]

Q. Now, Mr. Luce, is there any custom and practice with regard to what an engineer should do when a brakeman who is in view on the front footboard of an engine disappears from view?

A. The custom or the practice would be to stop immediately to ascertain what has happened to that man.

Q. Is that in conformity with this Rule 108? Are you familiar with that?

A. I am.

Q. That in case of doubt or uncertainty——

Mr. Gearin: Pardon me. I have no objection as yet.

Mr. Brobst: Q. In case of doubt or uncertainty, special care must be taken?

A. That rule, and also the fifth paragraph, Rule M.

Q. Rule M?

A. Yes, in the front of the book.

Mr. Gearin: That the employes must exercise care to avoid injury to themselves and to others, and so forth?

The Court: Is that the one you refer to?

A. Yes, sir.

Mr. Brobst: I was just wondering if we could introduce those rules in evidence, or whether we are governed on that by the pre-trial order. I don't know the procedure. Would it necessitate putting the whole book in evidence?

The Court: No, if you can put a transcript of

(Testimony of Robert Luce.)

the rules that counsel agree to, the particular ones that have been [77] referred to——

Mr. Brobst: Yes.

The Court: There is no reason why that can't be done.

Mr. Brobst: I think that is all.

Cross Examination

Q. (By Mr. Gearin): Now, Mr. Luce, assuming you are an engineer of a train on a train moving on the main line, and you are approaching a block signal. Will you tell the jury whether or not you will have to give your prime attention to that block signal.

A. In a straightaway movement, yes.

Q. Yes. There are lots of times when a brakeman will ride out on the front of the locomotive, on the step, without any necessity for it, are there not? A. Not on my engine, they would not.

Q. All right. If it is daylight and you are approaching a switch, a block signal, you don't have to have a brakeman on the front end of your engine on a short train to tell you where to stop with reference to that switch, do you? Do you understand my question, or would it be better for me to rephrase it?

A. Would you please rephrase it?

Q. If you have a short train, and you are approaching a switch, where it is daylight and clear, is there any necessity to have a brakeman on the

(Testimony of Robert Luce.)

front end of your locomotive to give you a [78] stop signal? A. Not in most cases.

Q. In most cases it is not necessary for him to direct the movement from that position. Is that a fair statement?

A. I would say it depended on the circumstances.

Q. All right. Can you give us a definite answer on these hypothetical facts: It is daylight, the weather clear, a slight downgrade, a slight grade downward on the main line approaching a switch and a block signal, under those circumstances would you feel that it was necessary to have a brakeman on the step of the pilot to direct the movement?

Mr. Brobst: Your Honor, I would like to object to that upon the ground that it does not include the other element, that there were workmen along there, welders, and they were working on the track.

The Court: Yes.

Mr. Gearin: I will reframe the question.

Q. Assuming a short work train on the main line, which consisted of an engine, tender, two K&J cars, ditcher, spreader, and caboose, proceeding at a speed of no more than 10 miles an hour, and approximately at two to four miles per hour, approaching a switch in daylight, with welders alongside the track at a distance of approximately a thousand to fifteen hundred feet from the switch, do you feel that under those circumstances it would be necessary to have a brakeman on the pilot of the [79] engine directing the movement?

A. It would be a good idea.

(Testimony of Robert Luce.)

Q. It would?

A. With workmen involved along the track.

Q. At that distance?

A. If a short move is to be made and you know you are going to head in, it would not be necessary to have a man in the cab. If he wanted to ride the footboard, that would be up to him, more or less.

Q. Then when the brakeman who rides out there in the front gets up there to line the switch, and you come up and stop at the switch, after you stop he gets off and then lines the switch?

A. That is correct.

Q. That is the custom and practice?

A. Yes.

Mr. Gearin: Thank you, Mr. Luce. We have no further questions.

Redirect Examination

Q. (By Mr. Brobst): One question. How close do you normally stop to a switch when you are going to line it, or when a brakeman is going to line it on a short train?

A. If the brakeman is on the pilot, it is possible to go right up to the switch. [80]

Q. He can direct the move from there right up to the switch? A. That is correct.

Mr. Brobst: I have nothing further.

Recross Examination

Q. (By Mr. Gearin): He can line the switch

(Testimony of Robert Luce.)

just as well if he is riding in the cab and gets out and walks up and lines the switch, can't he?

A. Yes, but there would be a delay, if they were in a hurry to clear the main line for an oncoming train.

Mr. Gearin: I have no further questions.

Mr. Brobst: That is all.

(Witness excused.)

(Thereupon the jury was excused, after the usual cautionary instructions by the Court, until Thursday, August 4, 1955, at 9:00 a.m., and after the jury had retired the following occurred out of the presence and hearing of the jury:)

Mr. Brobst: I would like to ask one or two questions, your Honor. I was going to prepare for argument to the jury, and I wanted to do it without interruption. I am going to put in by stipulation this actuarial computation of loss of future earnings, and I was going to multiply it out. I don't [81] want to use the blackboard, but there is no objection, is there, to my giving the total figures and the different percentages, like 2, 3 and 4 per cent, which show the present cash value of that money?

The Court: If you are going into the cash value, I am going to allow him to use the other figure. I think the jury is just as able to compute that as you are. I think when you get into this business of arguing about what the value of money is and what

the results of taxation are, and the results of a computation that anybody can make, as far as that is concerned, you had better keep out of it. The only thing I will say about that is this: If you open it up, I will just let Mr. Gearin argue whatever he wants to.

Mr. Gearin: Your Honor, I now at this time advise the Court that I formally withdraw my requested instructions with regard to the matter of taxation and income and estate taxes.

The Court: I am not going to instruct on the question, because I don't think it has anything to do with it. I think that these factors the jury can compute. It is very easy for them to figure out.

Mr. Brobst: With this table, yes. Sometimes judges say go ahead and put it in, and other times the Court will say not to, and I didn't want to do anything——

The Court: Of course, that is true. I won't stop you [82] from doing it, but I would let the other side go into most anything they wanted to as a result of it.

Mr. Brobst: I just wanted to know how to approach that.

The Court: That is my attitude. I wouldn't stop you from doing it, but when you get into all these things about the value of money and taxation, and so forth,——

Mr. Brobst: It is not the value of money. The cases hold that the true picture is the present cash value figure by the actuarial table. That is the true measure of damages to be presented.

The Court: I don't think there is anything mechanical in it, no matter what the cases hold. I don't think there is anything mechanical in the question of fixing damages. I think you put it up to the jury and let the jury decide. They know what the basic facts are. You can suggest an approach to them, but——

Mr. Brobst: The only reason I had it in mind is one case was reversed because they didn't put the actuarial table in but argued it on the basis of the full loss of earnings.

The Court: You are going to put it in, I take it?

Mr. Brobst: Because the Act says it shall be the present cash value of future earnings. The Act says that.

The Court: Yes, I understand that.

Mr. Brobst: So long as I put in the table and tell them how to figure it out and let them do it themselves, that is all right? [83]

Mr. Gearin: We only waived the identification of that, Mr. Brobst, that actuarial table that you handed me. I said I would have no objection to the identity of it, because you wanted to save expense by not calling an actuary, and I said you didn't have to do that.

Mr. Brobst: What does that mean?

Mr. Gearin: I am saving an objection as to the materiality and relevancy of it. As to the life expectancy table, I have no objection to the jury being instructed as to the man's life expectancy. I think that is proper. But all I did was to waive the iden-

tity of that. If you think I misled you on that and I stipulated that it go in, I will let it go in.

Mr. Brobst: Yes, because otherwise I would have to call an actuary to set up these figures.

Mr. Gearin: I will agree that the actuary, if permitted to testify, would testify in accordance with the statement that you gave me. But I did not intend to waive the objections to it. But if you think I did, I don't want any misunderstanding between us, and I will do whatever you say.

Mr. Brobst: I understood that it would go in, and if I called an actuary he would testify that the earning power of money, according to the actuarial table, is so much.

Mr. Gearin: If that was your understanding of our agreement, I will abide by your understanding of it.

Mr. Brobst: Because otherwise I would have to call an [84] actuary and have him come in and testify. This is by a reputable actuarial concern which we have used any number of times. It is based on the American Experience Table.

The Court: I think that is the normal practice. I would rule, in any event, that that would be sufficient either way. But on this question of argument, I would be guided simply by whatever it seems to the other side is necessary for them to meet whatever argument you make. In other words, generally speaking I will let you argue whatever you want to, and then as to the other side I would let them argue whatever they think is necessary to meet it.

Mr. Brobst: There was one other thing.

The Court: Incidentally, I am not controlled by any rules as to argument as to giving an instruction. I may be very chary about giving an instruction on any of this, because I think the question of damages is for the jury.

Mr. Brobst: That is right.

The Court: I don't think that I will lay down any guides for them as to anything else. The only question involved here is the question of whether you will be permitted to argue some phases about these factors, which have been introduced in a good many cases before me sometimes. But when I am not satisfied that there has been a fair presentation by either side, I will grant a mistrial as a result.

Mr. Brobst: That is what I wanted to be sure of.

The Court: You don't want to get into any trouble. I don't want you to.

Mr. Brobst: There was one other point, and that is this: In argument sometimes I like to refer to the instructions that will be given, and ask the jury to listen for them, to bring out and emphasize a point.

The Court: I would not suggest taking any chance on doing that here.

Mr. Brobst: I don't want to get up and say——

The Court: Not only that, but I have a personal custom, which all judges do not follow, and that is that I do not permit you to argue the law or to say that I am going to give an instruction, because I think that gives undue emphasis to the particular point that is being brought out, and the other side can get up say that I am going to say just ab-

solutely the contrary. I might give something in between. As a matter of fact, I usually don't know what I am going to say to a jury——

Mr. Brobst: I am confronted with that problem myself when I get up to argue sometimes. This other point: I may explain the Act to them, the way it operates, that he was not covered by State compensation, and that the only recovery is under this Act?

The Court: You will have to leave that to me.

Mr. Brobst: That is what I want to know. You are taking [86] all my argument away from me.

The Court: Your argument is simply as to whether the facts bring you under the rules of law.

Mr. Brobst: That is what I wanted to know. I have found out.

(Thereupon an adjournment was taken until Thursday, August 4, 1955, at 9:00 a.m.) [87]

Klamath Falls, Oregon, Thursday, August 4, 1955, Court reconvened, pursuant to adjournment, at 9:00 a.m., and proceedings herein were resumed as follows:

The Court: Proceed.

Mr. Brobst: Your Honor, I would like to call Mr. Shively as an adverse witness. He is an engineer and an employe of the company.

CHARLES J. SHIVELY

was produced as a witness in behalf of the Plaintiff and, having been first duly sworn, was examined and testified as follows:

(Testimony of Charles J. Shively.)

Direct Examination

Q. (By Mr. Brobst): Mr. Shively, where do you live, please? A. Beaverton, Oregon.

Q. What is your business or occupation?

A. Locomotive engineer.

Q. Back on October the 6th of 1952 how long had you been an engineer prior to that time?

A. Since March the 15th, 1951.

Q. And before you came down to work here on the Shasta Division on this work train, where had you been working as an engineer? [88]

A. Out of Eugene and Brooklyn.

Q. What type of trains were you acting on as an engineer?

A. All types; freight trains and switch engines.

Q. Was this your first experience on a work train? A. Yes.

Q. At the time that the accident happened your train was moving along about three to four miles an hour: is that correct? A. Yes.

Q. And it was a clear day? A. Clear.

Q. Nothing to obstruct your vision forward?

A. No, sir.

Q. As you came down there you could see Mr. Daulton until he disappeared from your view?

A. That is right.

Q. When he disappeared from your vision do you have any recollection of how far that was before you came to the switch that he was going to line?

A. Well, I would say 40 car lengths.

(Testimony of Charles J. Shively.)

Q. About 40 car lengths was where he disappeared? A. The last time I seen him.

Q. That is when he disappeared from your view, about 40 car lengths from the switch?

A. I would say that is the last time I seen him.

Q. Do you know where he was after that at all?

A. No, sir.

Q. Then you continued on for about 40 car lengths, is that correct? A. That is right.

Mr. Brobst: That is all. I have no further questions.

Cross Examination

Q. (By Mr. Gearin): Mr. Shively, as you approach a crossing what if anything directs your attention?

A. To the block signal and the right-of-way.

Q. Mr. Shively, are you familiar with the custom and practice regarding the operation of--your Honor, this is not proper cross examination, because it is not within the scope of Counsel's direct examination, and I will shorten it up because it will obviate the necessity of recalling the witness.

The Court: No, let's put the plaintiff's case on.

Mr. Gearin: All right. I have no further questions for the time being. That is all.

(Witness excused.) [90]

MARY EDITH DAULTON

the Plaintiff herein, was produced as a witness in her own behalf and, having been first duly sworn, was examined and testified as follows:

(Testimony of Mary Edith Daulton.)

Direct Examination

Q. (By Mr. Brobst): Mrs. Daulton, where do you live, please?

A. 3446 Greenwich Street.

Q. Donald L. Daulton was your husband?

A. Yes, sir.

Q. How old was he on October 6th of 1952?

A. He was 33.

Q. And how old were you? A. 35.

Mr. Brobst: I believe, Counsel, we can stipulate to his earnings without calling——

Mr. Gearin: We have the record here.

Mr. Brobst: I think that would be better. Would you stipulate, Counsel, that his gross earnings for the ten months preceding his death were $4,892.06?

Mr. Gearin: That is correct.

Mr. Brobst: Q. Are there any children?

A. Two.

Q. What are their ages?

A. Well, she will be seven in October and he will be nine in September.

Q. Now, as far as the conduct of your husband toward the [91] children, would you explain what he did in his spare time?

A. Mostly fishing. He was quite a home man.

Q. What was the general condition of his health?

A. Good.

Q. What had he done prior to working for the railroad?

A. Well, he was in the Marine Corps, World

(Testimony of Mary Edith Daulton.)

War II. Then he was in the Reserves a year before he was killed.

Mr. Brobst: I have no further questions.

Mr. Gearin: I have no questions.

(Witness excused.)

Mr. Brobst: Your Honor, at this time I would like to offer into evidence by way of stipulation Plaintiff's Exhibit No. D. I believe that the stipulation is if an actuary were called, a qualified actuary, that his testimony would be the same as the figures and percentages that are outlined on this document.

Mr. Gearin: That is correct, your Honor. However, we would like to reserve, and we interpose an objection as to the materiality of the actuarial computations. I think that is sufficient for the purpose of the motion.

The Court: Overruled. Admitted.

Mr. Gearin: Very well, your Honor.

(The Actuarial Table referred to was thereupon [92] received in evidence as Plaintiff's Exhibit D.)

Mr. Brobst: We offer into evidence a transcript of the rules which are attached to the pre-trial order.

Mr. Gearin: We waive the identity of them. Some of them, your Honor, like Rule 7, apply to switching movements, which is not applicable here. I think only the fourth paragraph of Rule 7-B is applicable, Counsel——

The Court: Let's not discuss that at the present time. Before we close the case you agree on the rules.

Mr. Gearin: I will withdraw my objection to them, your Honor. They may all go in.

The Court: All right.

(The transcript of rules above referred to was received in evidence as Plaintiff's Exhibit E.)

Mr. Brobst: The plaintiff will rest, your Honor.

Defendant's Witnesses

HARVEY TEAL

was produced as a witness in behalf of Defendant and, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Gearin): Mr. Teal, where do you live? A. Klamath Falls.

Q. What is your occupation?

A. Trainman for the Southern Pacific.

Q. How long have you been railroading?

A. Thirty-two years.

Q. As trainmaster what are your duties?

A. Well, they consist of supervision of the operation of trains on the Shasta Division.

Q. Does that include the operation of trains within a radius of 10 miles of Klamath Falls?

A. Yes, sir.

(Testimony of Harvey Teal.)

Q. Particularly with regard to work trains on the main line in the vicinity of Wocus siding?

A. Yes, sir.

Q. Are you familiar with the custom and practice of this division with reference to the operation of trains? A. Yes, sir.

Q. Will you state whether or not there is any custom and [94] practice with regard to the operation of a train upon the disappearance from view of a trainman apart from Rule 7-B?

A. No, sir.

Q. The purpose of Rule 7-B is what, Mr. Teal?

A. The purpose of Rule 7-B——

Mr. Brobst: Your Honor, I will object to that. I think the rule speaks for itself.

The Court: As I understand, you have introduced evidence of a custom and the interpretation of these rules yourself.

Mr. Brobst: All right. I will withdraw the objection.

The Court: I think it is just as fair for one side as the other. Proceed.

Mr. Gearin: Do you understand the question?

The Witness: May I have the question again?

(Last question read.)

A. The purpose of Rule 7-B is to afford the engineer eyes or protection in a movement where he is backing up or shoving cars ahead of the engine.

Mr. Gearin: I have no further questions.

(Testimony of Harvey Teal.)

Cross Examination

Q. (By Mr. Brobst): What about Rule 108? Do you know that rule?

A. Rule 108—I don't believe I can quote it in its entirety exactly like it is worded, but it has to do with [95] taking special care when there is any case of doubt, I believe.

Q. That is right. And if a man is riding out on the front end of the engine and he goes out of the view of the engineer and the engineer doesn't know where he went, do you just keep right on going?

A. Depending entirely on the way the engine is headed. If it is headed forward, there would be no occasion for apprehension.

Q. If this man has gone off the front footboard where he is riding, disappears from view, and the engineer doesn't know where he went, the engineer would keep right on going?

A. I would say yes.

Mr. Brobst: I have no further questions.

Mr. Gearin: Thank you.

(Witness excused.) [96]

CHARLES J. SHIVELY

was thereupon produced as a witness in behalf of the Defendant and, having been previously duly sworn, was further examined and testified as follows:

Direct Examination

Q. (By Mr. Gearin): Mr. Shively, in your years of railroading are you familiar with the cus-

(Testimony of Charles J. Shively.)

tom and practice with reference to the operation of trains? A. Yes, sir.

Q. Mr. Shively, do you know of any custom and practice with reference to the disappearance from view of a trainman apart from the provisions of Rule 7-B? A. No, sir.

Q. Now, as you approached the siding I believe you testified your view was concentrated upon the block signal. A. Yes, sir.

Q. Will you explain to the jury, please, what a block signal is and its purpose.

A. Well, it is a signal for safety precautions, and tells you whether another train is approaching, and it keeps the trains from having an accident, from coming together. You have three aspects: The yellow—well, I should say the green, yellow and red. You are governed by all three aspects. The reason I was watching it was we were going in on a siding [97] for a freight train.

Q. Where was the freight train coming from? In what direction?

A. Coming from a westerly direction, approaching us. We were traveling in an easterly direction, railroad direction east. And it is more or less a practice to watch the block signals to determine just about where that train is at. And the block signal being in a clear position tells you that he is at least two miles away, for that covers back at least that far. It is just a common practice to more or less watch the block signal and use it for a governing point where to stop and to head in at the

(Testimony of Charles J. Shively.)

switch. The switch is just at the block signal, and it is more or less of a point that shows you where you have to stop.

Q. Mr. Shively, on the day of the accident was Mr. Daulton directing the movement?

A. No, sir.

Mr. Brobst: I will object to that, your Honor, as leading.

Mr. Gearin: I will withdraw the question and stipulate that the answer may be stricken.

The Court: I think it is leading.

Mr. Gearin: Q. What was Mr. Daulton doing, as far as you know, on the front footboard of the locomotive?

A. Riding down to the switch. [98]

Q. State the fact as to whether or not you were relying upon him for assistance in any way with reference to the switch or stopping your locomotive?

A. No, sir.

Q. What was the first indication you had that something was wrong, Mr. Shively?

A. That the switch had not been lined up, because if he had lined the switch the block would have went red, and it was still in a clear position.

Q. You say that the last time you saw Mr. Daulton was how far away from where you stopped?

A. Approximately 40 car lengths.

Q. Were you watching Mr. Daulton, or what were you doing with reference to him?

A. No, sir; no, sir. I wasn't watching him.

(Testimony of Charles J. Shively.)

Q. Are you able to advise us or do you know at all where he went out of your sight?

A. Sometime after I had seen him wave his arm at somebody along the right-of-way.

Q. Who were they, do you know?

A. Well, it was a track welder.

Q. How far was that from where you stopped for the switch?

A. Approximately 40 car lengths.

Q. Now after the accident, Mr. Shively, did you examine the front of the locomotive? [99]

A. I walked around the front of it, yes.

Q. Do you have any knowledge whatsoever of any work done to the left footboard prior to the morning that you started out on October 6th?

A. Yes.

Q. Will you tell the jury what that was.

A. There was a new footboard put on the engine.

Q. On what side was that?

A. On the left side.

Q. And the last time you saw Mr. Daulton he was riding on which side?

A. The right side.

Q. Did you examine the right footboard after the accident? A. Yes.

Q. Tell the jury what you saw, if anything, with reference to the right footboard.

A. It was just in good condition, as far as I know.

Q. Will you state whether or not there were any

(Testimony of Charles J. Shively.)

bolts projecting in the center of the footboard on the right side of the locomotive? A. No.

Mr. Brobst: I will object to that, your Honor, as leading.

The Court: Yes. Objection sustained.

Mr. Brobst: The answer is in now. [100]

The Court: The answer is stricken. In the future, Counsel, be careful about leading questions.

Mr. Gearin: I tried to be, your Honor.

The Court: The damage is done when the answer is in.

Mr. Gearin: Yes, your Honor.

Q. Mr. Shively, through the courtesy of Mr. Hadlock I am handing you some exhibits which have been marked as Pre-Trial Exhibits 2-A to 2-R, inclusive. They are in no particular order, but one at a time I will ask you to identify, if you can, the exhibits that are being handed to you. And, please, Mr. Shively, when you are identifying any of these exhibits, look at the back thereof and state first the number that appears on the reverse side, and tell the jury thereafter, if you can, what it is you have in your hand.

A. 2-N, the footboard of a locomotive.

Q. Of what locomotive as of what time?

A. I don't know.

Q. Will you take the next one, please.

A. 2-J.

Q. Can you identify that?

A. The footboard of a locomotive.

Q. Do you know what locomotive that is?

(Testimony of Charles J. Shively.)

A. No, sir.

Q. All right. Take the next exhibit.

A. 2-Q, the footboard of a locomotive. [101]

Q. Do you know which one it is?

A. No, sir. 2-M.

Q. Do you know what that is?

A. It is a footboard of a locomotive.

Q. Do you know of what locomotive?

A. No, sir.

The Court: Don't you know whether he knows or not? Why go over a whole list of photographs like this?

Mr. Gearin: I had assumed that he did, your Honor.

The Court: But he doesn't. Let's stop now. Give him those that you know he can testify to; not go over a whole list that he doesn't know anything about.

Mr. Gearin: All right. I am sorry, your Honor. Will you hand those to the witness and I will ask him if there are any of those pictures that he can identify, and which ones.

Mr. Brobst: Your Honor, he just went through all of them and said he couldn't identify them.

The Court: I don't know that, Counsel.

The Witness: This is 2718.

Mr. Gearin: That is the locomotive that was involved in this accident? A. Yes, sir.

The Court: What exhibit is that?

A. Exhibit 2-I. [102]

Mr. Gearin: Q. With reference to the locomo-

(Testimony of Charles J. Shively.)

tive and with reference to the time of the accident, can you state as of what time that picture—I don't want to ask leading questions, but I am having the same trouble Mr. Brobst had yesterday—will you state as of what time that shows Engine 2718.

A. This photograph here?

Q. Yes, sir.

A. Well, this photograph here has no new footboard on the left side.

The Court: That answer is stricken.

Mr. Gearin: I have no further questions.

Cross Examination

Q. (By Mr. Brobst): Mr. Shively, as you came down toward the block signal you had to pass a welder who was working there alongside of the track, didn't you? A. Yes.

Q. Your attention was on, you say, the block signal? A. Yes, sir.

Q. That is a straight track out there, isn't it? You can see for four or five miles down the track?

A. No, sir. There is a curve. We came out of a curve and were coming into a curve. This is prior to CTC. Since [103] then I don't know how the track has been.

Q. How long had you worked on that particular section of the track before the accident?

A. Oh, I would say approximately three months off and on, firing and running engines.

Q. All right. Now, as you came down there you say that you were concentrating on the block signal

(Testimony of Charles J. Shively.)

and were watching along the track to see whether the workmen may have mislaid something along the track. A. I was.

Q. Then your attention was forward, directed to anything that might be forward of your engine; is that correct? A. That is right.

Q. So that your concentration or your looking was not only to the ground but it was to the block signal, and Mr. Daulton was squarely in the middle between the tracks and the block signal; is that correct? A. That is right.

Q. Mr. Shively, do you remember the taking of your deposition in Portland, back on March 9th of 1955, when I was representing the plaintiff and asking you questions and Mr. Gearin was there representing you?

Mr. Gearin: No, I wasn't there.

Mr. Brobst: I am sorry. Mr. Oglesby H. Young of Koerner, Young, McColloch & Dezendorf was representing you. [104]

Q. I would like to have this handed to you and I would like you to read Page 15, please.

Mr. Gearin: I think the original should be handed to the witness.

Mr. Brobst: If the deposition is there.

Mr. Gearin: We object to this, your Honor. The deposition has not been marked as a pre-trial exhibit.

The Court:: I had this pre-trial order amended for the purpose of putting in all the exhibits. Why wasn't it put in?

(Testimony of Charles J. Shively.)

Mr. Brobst: I thought it was filed with the Clerk and would be part of the record. I may have been mistaken. I certainly would have marked it as an exhibit.

The Court: All right. Let's mark it now and put it in the pre-trial order. The original will be marked and a proper notation made in the pre-trial order. If Counsel were not unacquainted with the custom of this Court, I would not permit this.

Mr. Brobst: Yes, I appreciate that.

(The deposition of Charles J. Shively was thereupon marked Plaintiff's Pre-Trial Exhibit F.)

The Court: However, it will be used only for the purpose of impeachment.

Mr. Brobst: Yes, your Honor. [105]

Q. Just prior to reading that, your testimony is that he went from your view when you were about 40 car lengths away from where the welders were working? A. Yes.

Q. I mean from where the switch was? Pardon me.

Mr. Gearin: He said he didn't notice him after that.

Mr. Brobst: Q. One other question: Did Mr. Daulton make some signal or sign as the train went by the welders?

A. I seen him raise his hand, yes, and wave to them like a train was coming.

Q. Did he give a slow signal? A. No, sir.

(Testimony of Charles J. Shively.)

Q. What kind of a wave did he give?

A. Just like a highball that a train was coming.

Q. All right. Will you read Page 12, please. Read it to yourself. Do you recall at that time my asking you these questions and you giving the following answers, referring to Mr. Daulton:

"Q. Did he ever disappear from your view?

A. Just before we got to the switch.

Q. How far before you got to the switch?

A. I don't recollect how far offhand, it has been so long ago.

Q. What did you do when he disappeared from your view? [106]

A. I stopped at the switch.

Q. How far was that, would you say, that you traveled? A. That I traveled?

Q. Yes, after he disappeared and down to the time you got to the switch.

A. I stopped about a half an engine length from the switch.

Q. You stopped about a half-engine length, about half the length of the engine from the switch. How far would that stopping point be from where you first saw Mr. Daulton disappear?

A. I don't recall that.

Q. Have you any idea at all?

A. No, I have not."

Now, Mr. Shively, since the taking of that deposition what has refreshed your recollection that you saw him disappear some 40 car lengths from the

(Testimony of Charles J. Shively.)

switch and that you traveled that 40 car lengths after he disappeared?

Mr. Gearin: We object to the form of the question, your Honor. Mr. Shively's testimony is he didn't see him after that 40 car lengths.

The Court: I think the objection will be sustained, because I don't think it is impeachment.

Mr. Brobst: I have no further questions. [107]

Mr. Gearin: I have no further questions.

(Witness excused.)

(Short recess.)

Mr. Gearin: If the Court please, pursuant to the terms of the pre-trial order, in which the pre-trial exhibits have been marked, it being agreed that no further identification of the exhibits is necessary, we offer Defendant's Pre-Trial Exhibits 2-A to 2-H, inclusive.

Mr. Brobst: Does the pre-trial order show when they were taken?

Mr. Gearin: No. The photographer who took them advises me they were taken the morning after the accident.

Mr. Brobst: All right, so long as we have the time when they were taken.

Mr. Gearin: They were taken on October 7th, your Honor.

Mr. Probst: That will be established by proof? I can't stipulate to that.

Mr. Gearin: Yes, it will be by the next witness.

The Court: All right. Admitted.

(The photographs referred to, having been previously marked as pre-trial exhibits, were received in evidence as Defendant's [108] Exhibits 2-A to 2-H, respectively.)

JAMES F. IRVINE

was produced as a witness in behalf of the Defendant and, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Gearin): What is your occupation, Mr. Irvine? A. Claims agent.

Q. By whom are you employed?

A. Southern Pacific Company.

Q. By whom were you employed on October 6th, 1952? A. Southern Pacific Company.

Q. Have you ever had occasion to photograph Engine 2718? A. Yes, I did.

Q. When and where?

A. In the Klamath Falls roundhouse on the night of October 6th, 1952.

Q. I am handing you Pre-Trial Exhibits 2-J, 2-N, 2-Q, 2-M, 2-I, and 2-K. I will ask if you can identify those. A. Yes, sir.

Q. Will you advise us what they are.

A. Those are the pictures that I took of Engine 2718 at that time and place. [109]

Mr. Gearin: Mr. Kenyon, will you hand to the witness the exhibits marked 2-A to 2-H, inclusive, that you now have in your hand.

Q. Referring to Exhibits 2-A to 2-H, Mr. Irvine,

(Testimony of James F. Irvine.)

I will ask you the preliminary question where were you on the morning of October 7th, 19[illegible]?

A. I was in the Klamath Falls yards.

Q. Do you know where Engine 2718 was at that time? A. It was in the roundhouse.

Q. With regard to the exhibits that you hold in your hand, will you state, if you know, when they were taken.

A. They were taken on the morning of October 7th, 1952.

Q. Do you know by whom?

A. Yes, I do.

Q. Who took them? A. Frank Scott.

Q. Under whose direction or supervision, if any?

A. Mine.

Mr. Gearin: Now we ask, your Honor, that Exhibits 2-I, 2-J, 2-K, 2-L, 2-M and 2-N be received into evidence under the testimony and under the provisions of the pre-trial order.

The Court: There is another question that should be asked under those circumstances, to lay a proper foundation, and that is whether they correctly represent the situation.

Mr. Gearin: I was afraid of a leading question, your [110] Honor.

The Court: Go ahead with that.

Mr. Gearin: Q. Mr. Irvine, will you state what the fact is as to whether or not the photographs which you have in your hand and the photographs that you took are or are not a correct and true

(Testimony of James F. Irvine.)

representation of the object that is shown in the photographs.

A. Yes, they are true representations.

Mr. Gearin: We renew our offer into evidence, your Honor.

The Court: Admitted.

(The photographs referred to were thereupon received in evidence as Defendant's Exhibits 2-I, 2-J, 2-K, 2-L, 2-M and 2-N, respectively.)

Mr. Gearin: I have no further questions. Thank you, Mr. Irvine.

Cross Examination

Q. (By Mr. Brobst): Mr. Irvine, who was out there with you when the pictures were taken, the ones on the night of October 6th?

A. I believe Mr. Patterson was.

Q. Do you know whether any work had been done on that engine before the pictures were taken?

A. No, no work had been done.

Q. You don't know that, do you?

A. Yes, I do.

Q. Was any work done?

A. Let me correct myself there. There was no work done. That is true.

Q. I didn't hear you.

The Court: He said there was no work done.

Q. There was no work done. To your knowledge, Mr. Irvine, was the condition of the engine's running board changed any after those pictures were taken? A. No.

(Testimony of James F. Irvine.)

Q. What was that? A. No.

Q. The engine is in the same condition, or the condition of the footboards of that engine haven't changed any since the time of the pictures?

A. The condition of those footboards hasn't changed; no, sir.

Q. Have those footboards been on that engine ever since the taking of the pictures?

A. No, sir.

Q. When were they removed?

A. A day or so after the accident.

Q. Do you have a work report showing when they were removed? A. I believe there is one.

Mr. Brobst: Counsel, do you have a work report showing when they were removed?

Mr. Gearin: Here are the only work reports I have with reference to that locomotive. I showed you those this morning. These are the only ones of which I have knowledge.

Mr. Brobst: Q. Mr. Irvine, I notice here that you have reports. Now as claims agent for the Southern Pacific are you familiar with the requirement that there must be a daily locomotive inspection report made?

A. I am not familiar with the requirements. I know there is such a report made.

Q. Yes. I notice on this Defendant's Exhibit it says "Daily Locomotive Inspection and Repair Report." You said you are not familiar with that?

A. No, I am not.

Q. Here are the daily reports that have been

(Testimony of James F. Irvine.)

presented as exhibits from October 4th through to 8-22-53. I would like, if permissible, to have them handed to the witness. Will you go through these and see if you can find any place in those daily reports where anything was done as far as the right running board was concerned.

The Witness: Would you repeat the question, please.

(Last question read.)

A. No, I can't find anything.

Q. Mr. Irvine, to your own knowledge do you know whether or not any work was done on the right running board from the time of the happening of the accident until the pictures were taken by you? A. No, no work was done.

Q. Do you know of your own knowledge?

A. I would have to ask you to explain what you construe as my own knowledge.

Q. When was the first time you saw the engine?

A. The first time I saw the engine?

Q. After the accident.

A. Was in the evening of October 6th, 1952.

Q. And the accident happened about 2:00 in the afternoon, or 3:00? A. Approximately.

Q. You don't know what was done with the engine between that period from 3:00 o'clock until the time that you saw it?

A. Only by what was reported to me.

Q. So then you don't know of your own knowledge what might have happened to it in that three-hour period?

(Testimony of James F. Irvine.)

A. Other than what was reported to me.

Mr. Brobst: I have no further questions.

Redirect Examination

Q. (By Mr. Gearin): Mr. Irvine, do you know whether or not the work of removing [114] or replacing the footboard on the pilot would be required to be reported under the daily inspection and repair work?

A. Well, it would be my understanding that it would not.

Mr. Brobst: Your Honor, I will object to what his understanding is.

The Court: Yes. Stricken.

Mr. Gearin: Q. The question is, Mr. Irvine, do you have any knowledge as to whether or not that work is covered. You can answer that Yes or No, please. A. No, I don't.

Mr. Gearin: All right, sir. That is all.

(Witness excused.) [115]

HAROLD PATTERSON

was produced as a witness in behalf of the Defendant and, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Gearin): Mr. Patterson, what is your occupation? A. Boilermaker.

Q. By whom are you employed?

A. Southern Pacific Railroad.

(Testimony of Harold Patterson.)

Q. By whom were you employed and what was your work on October 6th, 7th and 8th in the month of October, 1952?

A. Southern Pacific Railroad.

Q. Do you recall the occasion when Mr. Daulton lost his life? A. Yes.

Q. Bearing that date in mind, will you state whether or not thereafter you ever had any occasion to perform any work on Engine 2718?

A. I was instructed to remove the pilot.

Q. Do you recall when that was with reference to Mr. Daulton's death?

A. It was about two or three days after the accident.

Q. Will you describe what the pilot is.

A. Well, it is known as a combination pilot and footboard. It can be used for road service or switching service. [116]

Q. Through the courtesy of the Bailiff I am handing you Defendant's Exhibit 2-E. I will ask you if you can point out, please, where the pilot is on the locomotive.

A. Well, the pilot is the complete section across here that fastens to the pilot beam. This whole section is known as the pilot.

Q. And does that include one or both footboards? A. Both footboards.

Q. And anything in addition to the footboards?

A. Yes. The little metal part in between is known as the pilot.

Q. Is that what we call the cow-catcher?

(Testimony of Harold Patterson.)

A. Yes.

Q. Now I am handing you Exhibit No. C, and I will ask you if you can identify the pilot in that picture.

A. This is the pilot that was put on after we removed the original one.

Q. Who put the one on that is shown in that photograph? A. I did.

Q. When was that done with reference to the time that you took the pilot off the engine?

A. The same day.

Mr. Gearin: I have no further questions. [117]

Cross Examination

Q. (By Mr. Brobst): Mr. Patterson, who instructed you to remove it? A. My supervisor.

Q. When any work is done on an engine, aren't you required to make a report?

A. Well, this was not considered repair work. It was just removed to keep as evidence.

Q. Mr. Patterson, don't you keep a daily report of each engine as it comes in? A. Yes.

Q. Do you keep those in a clip file in rotation?

A. Yes.

Q. What would be the explanation if some of the reports are missing?

Mr. Gearin: Now, your Honor, I resent that accusation of Counsel, that certain of those things were prepared for the purpose of showing repairs to the locomotive as shown by the photographs, particularly A, B and C, with reference to the time

(Testimony of Harold Patterson.)

that the headlight shield was taken out, and other things like that. And I resent the accusation that there are missing things and that the true record is not here. If he had wanted those records, we could have gotten them.

Mr. Brobst: I intended no accusation, your Honor; just an explanation. [118]

The Court: If the witness knows, he may say so. Do you know why some of these reports may be missing? A. No, I don't.

The Court: Go ahead.

Mr. Brobst: Q. Now, you have that exhibit before you, Mr. Patterson. Looking at it, do you see a bolt in the center of the footboard there, the bolt head protruding?

A. This here is the pilot that was put on to replace the original one that was involved in the accident.

Q. You put one on that shows the bolt head protruding after the accident; is that correct?

A. Yes.

Mr. Brobst: I have no further questions.

Redirect Examination

Q. (By Mr. Gearin): Mr. Patterson, did you make an inspection report covering the change of the pilot in this instance? A. No.

Q. Why not?

A. The report was on the clipboard, and there was no—that I know of there wasn't anything there

(Testimony of Harold Patterson.)

to sign for. There was no repair work made to that original pilot.

Mr. Gearin: That is all.

(Witness excused.) [119]

W. T. CHRISTENSEN

was produced as a witness in behalf of the Defendant and, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Gearin): Mr. Christensen, what is your occupation?

A. I am with the Oregon State Police.

Q. In what capacity? A. Patrolman, sir.

Q. What was your work in October of 1952?

A. I was patrolling North Highway 97.

Q. That is in Klamath County?

A. Klamath County, sir.

Q. Directing your attention to the hour of approximately 3:00 o'clock on the afternoon of October 6th, 1952, where were you about that time?

A. I was just about at the city limits of Klamath Falls.

Q. Were you informed as to Mr. Daulton's death? A. Yes, sir.

Q. What did you do upon receipt of that information?

A. I went to Wocus and went over to the railroad tracks and went up to investigate the accident.

(Testimony of W. T. Christensen.)

Q. Did you have occasion on that day to see Engine 2718? A. Yes, sir.

Q. Will you state what the fact is as to whether or not, [120] Officer Christensen, you made an investigation concerning the death of Mr. Daulton.

A. Yes, I checked it.

Q. What did you do with reference to Engine 2718?

A. I looked the engine over to see if there was any defects on the front of it where he could possibly have fell off, or something.

Q. Will you state whether or not you made any examination of any particular part of the front portion of the locomotive.

A. I looked the boards over on the front end and the handrails over.

Q. Did you get on any portion of the locomotive? A. Yes, I stood on both boards.

Q. Will you state what the condition of the footboards was.

A. One footboard was fairly new, I would say, and the other was—it looked like it had some service. It was oily.

Q. You are being handed Exhibit 2-I. I will ask you if you can identify that. A. Yes.

Q. What is that?

A. That is the engine that I was out to investigate the accident on.

Q. Can you compare the condition of the locomotive as shown in that photograph with the condition of the front of the locomotive as you observed

(Testimony of W. T. Christensen.)

it at the time you went out and made [121] your investigation? A. It looks the same; yes, sir.

Mr. Gearin: I have no further questions.

Cross Examination

Q. (By Mr. Brobst): Officer, did you take any particular note of the presence or absence of any bolts on any of the running boards or on the footboard? A. No, sir; I didn't.

Q. You can't give us any information, then, with reference to the condition of the bolts on the running boards?

A. The only thing—no, not as to bolts. I just remember the one board and the other board.

Q. One board was new and the other one looked like it had been used and was oily?

A. Yes, sir.

Q. Also, Officer, did you have occasion to go on the track and retrieve any of the personal effects of Mr. Daulton? A. Yes, I did, sir.

Q. For what distance were they along the track as you observed them in picking them up?

A. I couldn't tell the exact distance, sir. I would say 75 feet.

Q. Now the board that was oily, that was the board where [122] the man fell; is that correct?

A. I don't know that, sir.

Q. Could you tell whether it was the right or the left running board?

A. Well, I was facing the engine. The engine

(Testimony of W. T. Christensen.)

was heading north. The new board was on my right.

Q. And the oily one was on your left?

A. That is right, sir.

Mr. Brobst: I have no further questions.

(Witness excused.)

Mr. Gearin: We would like to introduce into evidence, your Honor, Pre-Trial Exhibit No. 3, being the time return and delay report of engine and train employes; also Exhibit No. 5, consisting of a diagram of the scene of the accident and the rail defection test; also Exhibit No. 6, reports of engine inspection, these exhibits having been referred to in the pre-trial order and in which identification was waived. Will you show them to Counsel, please.

Mr. Brobst: Your Honor, the only document I see no objection to is the report of inspection, but the other two I don't know the purpose of.

Mr. Gearin: No particular purpose, your Honor, with the exception of the delay report, which shows the time that the [123] train got into Klamath Falls that evening. I think that has a bearing upon the question as to whether or not any work was done there before the photograph was taken. It is not tremendously important, but the map merely shows the curve and the siding, and the deflection test shows that the rail was not rough.

Mr. Brobst: I have no objection to them. I can't actually——

The Court: If there is no objection, let's admit them. They were shown to you and they are in the

pre-trial order. If there is no specific objection, I will admit them.

(The documents above referred to, as identified in the pre-trial order, were received in evidence as Defendant's Exhibits 3, 5 and 6, respectively.)

Mr. Gearin: The defendant rests, your Honor.

Mr. Brobst: The plaintiff rests, your Honor.

Mr. Gearin: I would like to present a legal matter to your Honor.

The Court: Ladies and Gentlemen of the Jury, you are now excused for a few moments while some legal matters are being taken up.

(Thereupon the jury was excused from the courtroom, in custody of the Bailiff, [124] and the following occurred out of the presence and hearing of the jury:)

Mr. Gearin: At this time, if the Court please, the defendant respectfully moves the Court for an order directing the jury to return a verdict against the plaintiff and in favor of defendant on the ground and for the reason that there is no satisfactory evidence or no evidence of any kind that the bolt shown in the photographs which have been described by the witnesses who examined the engine after the accident was there at the time. There is no testimony of any defect in the locomotive under the Boiler Inspection Act, and there is no evidence of negligence under the Federal Employers Liability Act, nor is there any evidence of any act or omission on the part of defendant constituting a

proximate cause of the death of the deceased. Furthermore, there is no evidence that any defect in the locomotive, had there been one, caused the death of the deceased.

I merely want to say, your Honor, that the numerous cases construing the Federal Employers Liability Act, the Safety Appliance Act and the Boiler Inspection Act are well known to the Court, and I presume they are to Counsel. I am going to say this: That the statement of facts in the pre-trial order, Paragraph I, recites that Donald Roy Daulton received injuries which resulted in his immediate death. I will admit for the purpose of the record that there is testimony [125] that there was a custom and practice with regard to the stopping of a locomotive in a short distance. Coupled with the reaction time which one must consider in defining a short distance, there is no testimony by which the jury can infer anything other than that the deceased met his immediate death as soon as he somehow—we don't know how—got under the locomotive. I submit that to permit the jury to pass upon the charges and contentions made in this case by the defendant would be an invitation to the jury to step into the realm of speculation and surmise. There is no testimony by which we can infer how the man met his death.

The Court: That is all right. The Supreme Court has laid down a very different rule about that. They say the jury is supposed to pass on it, so I am going to let them pass on it. I reserve the motion.

Mr. Brobst: Thank you, your Honor.

The Court: At this time I may as well discuss the question of instructions. I think that there are some things in the instructions I should call your attention to. According to the Civil Rules I am supposed to give you an idea as to what I will do with the requested instructions. I hereby reject them all.

Now I think I will indicate about what line I am going to take. Generally speaking I think that the method will be simply to instruct with the ordinary instructions that [126] are given in a case of this sort. I will not read any statutes to the jury, but I will give them the effect of the statutes in each instance.

I am going to submit to the jury this question of whether there was any defect on the running board at the time of the accident within the scope of the Federal Boiler Inspection Act. There seems to be a little difference between counsel, and of course in this type of case counsel are both very experienced and know what it is all about.

What do you think the line is in here, where the instructions seems to depart from the normal and seem to depart also from the pre-trial order? As I understand the situation, notwithstanding the requests that have been put up to me, the duty is a continuing one and an absolute one as far as the condition of the engine is concerned, and proof of a defect dangerous to life and limb is proof in and of itself of negligence. The only question, as I understand it, is a question of whether that was a proximate cause of the accident.

Now I don't know that the instructions carry that out, but the instructions that are asked by the plaintiff seem to indicate that the duty is one of ordinary care to keep the equipment in order. Is that your idea?

Mr. Brobst: There were two phases of it that I tried to present. One is that it is a continuing duty to provide him [127] with a reasonably safe place to work. That is the negligence charge. And the other one is that there is an absolute duty under the Boiler Inspection Act to keep it safe as to life and limb.

The Court: With regard to that the only question in this case would be the question of whether that was a proximate cause?

Mr. Brobst: That is right, your Honor. That is correct.

The Court: All right.

Mr. Gearin: There is a question as to whether or not there was a defect, your Honor. You are not going to instruct the jury that there was a defect and leave only the question of proximate causation? Maybe I misunderstood your Honor. Maybe I am being unduly sensitive about that.

The Court: I think counsel are extremely sensitive, because I have never had the idea that the question of whether there was a defect was not one for the jury.

Mr. Brobst: That is true.

The Court: Now, this question of proximate causation, in that respect if the jury finds in that regard that there was a defect and that it contrib-

uted proximately to cause the death, that is sufficient, isn't it?

Mr. Brobst: That is sufficient.

Mr. Gearin: I am afraid so. [128]

The Court: That was my idea about that. Now, where otherwise than that do you have any question of a safe place to work?

Mr. Brobst: I don't think we have, frankly, if that is included, because we haven't put in there the question of a reasonably safe place to work. I don't think that issue has been raised.

The Court: That was my opinion, but you have asked instructions on that.

Mr. Brobst: That was put in when I was making up the instructions.

The Court: I think, then, we have no debate about anything else in that regard, and I think that proximate cause, or proximate contributing cause, is also coupled with the finding, if there be one, that there was a defect, and that would have to be construed the same way as in an ordinary case.

Mr. Brobst: All right.

The Court: I don't find any difficulty with that. Now, then, as to this measure of damages, I think that I won't give any instruction with reference to the value of money because I think that is asking me to comment on the evidence.

Mr. Brobst: Yes. It wasn't the value of money——

The Court: The earning power of money. According to your Instruction 25, according to the circumstances, they [129] could make an allowance for the earning power of money.

Mr. Brobst: That is based on the actuarial table. Your Honor, the statute says that you are entitled only to the present cash value of the loss of future earnings. I think that is the requirement, and it is not a question of——

The Court: Just a moment. Do you agree to that?

Mr. Gearin: I don't recall the statute, your Honor.

The Court: Have we got the statute here?

Mr. Brobst: I have it in my hotel room. Here is my idea on that: I know the cases hold in death cases if you recover without your actuarial figures being in it will be reversed because that is not the true test of damages. They must make an allowance for the earning power of money, because it would be too high. I mean it is giving the defendant a break, because you invest your lump sum at a 3 per cent interest rate and it cuts down the lump sum to give this widow what she would anticipate per month——

The Court: It seems to me it enters into the field of speculation. What is your suggestion?

Mr. Gearin: Your Honor, I am trying to recall the instruction which your Honor has given in other cases under the F.E.L.A. My impression is that the instruction which your Honor has given, and to which I have never taken exception, is the loss of pecuniary benefits.

Mr. Brobst: It is the present cash value, I think, is [130] the test. We have run into that in other cases which we have had to retry because of it. It

works to the benefit of the defendant, because it cuts down.

The Court: That is what I am trying to get at here. I think it is a minor and immaterial instruction myself because of the fact that I don't think the jury pays a bit of attention to that sort of an instruction. But in order to avoid error I would be pleased if counsel would indicate an instruction that they could agree on.

Mr. Brobst: Your Honor, I think the Guthrie case and that other United States Supreme Court case that I cited in my trial brief states the rule pretty thoroughly, and it is one that we have followed ever since that Guthrie decision in San Francisco.

The Court: Yes, but the Guthrie case has a lot of implications besides that. The Guthrie case didn't arise in this sort of action.

Mr. Gearin: The measure of recovery is the pecuniary benefits reasonably to have been anticipated, benefits of which they have been deprived as a result of the employe's death, such damages being such pecuniary assistance or support as they might reasonably have expected to receive had the employe lived.

The Court: That clause is included in your Instruction No. 27, Plaintiff's 27. [131]

Mr. Gearin: That was my thought, pecuniary benefits.

The Court: And also No. 26.

Mr. Brobst: I don't want it to be raised after-

wards that it was error because it was not the present cash value. That is the thing——

Mr. Gearin: We won't raise that question, your Honor.

Mr. Brobst: That is the thing that concerns me most.

Mr. Gearin: I assure you we won't raise that in this court or any other court.

The Court: With the consent of the defendant, the Court will refuse to give Plaintiff's Instruction 25.

Mr. Gearin: I don't know whether the record is complete. We agree to the withdrawal of the request. We will raise no point on the Court's failure to give it.

The Court: I will make it with the consent of the defendant in that regard. I have the consent of the defendant, so I won't ask for the consent of the plaintiff.

Mr. Brobst: Here is the case. It says: "The true measure of recovery is the present cash value of future benefits of which the beneficiaries were deprived by the death, making adequate allowance according to the circumstances for the earning power of money," citing Chesapeake Railroad vs. Kelley, 241 U.S. 495.

The Court: I don't think that is anything the Supreme Court has the power to control me on, whether I give an instruction [132] in that regard or not. I think myself it is a comment on the evidence. If the Supreme Court wants to take a different view of it, that is all right, but I think it

is a comment on the evidence. I think what they have to consider is adequate compensation for the injury. I think they can take into consideration the earning power of money, and so forth and so on, but I don't think I have to tell them they are going to.

Mr. Brobst: Here was the thing, your Honor, that concerned me about it. The Supreme Court said:

"So far as a verdict is based upon the deprivation of future benefits, it will afford more than compensation if it be made up by aggregating the benefits without taking account of the earning power of the money that is presently to be awarded. It is self-evident that a given sum of money in hand is worth more than a like sum of money payable in the future."

That was the thing that I was afraid of. It raises a question in my mind. Of course, if they waive the error, I don't mind, actually, because the plaintiff has a better break——

Mr. Gearin: Don't worry about me.

The Court: As a matter of fact, I have sat long enough on the Federal Court so that if I thought it was more than adequate I would set it aside.

Mr. Brobst: That is right.

The Court: But if I am satisfied with it, then I am perfectly willing to let the Supreme Court say I was wrong in not giving the instruction. But the defendant has waived that, so I don't see any danger in it anyhow. Besides, I think it gives them a problem that they are not equipped to handle.

That is my notion about it. If I tell the jury what the present value of money means, they are not going to pay any attention to that. If the Supreme Court doesn't like my comments on this thing, I would be very glad if they would reverse it. The thing is chiefly whether I am satisfied with the verdict.

Mr. Brobst: That is all right, then. I just was sure I had some authority someplace for it, or I wouldn't have put it in there.

The Court: A good many times these things that the Supreme Court says in its opinions are for the purpose of guiding the trial court as to whether or not the trial court feels that they have exceeded the measure of compensation that should be awarded in a case. I think that is the expression rather than that we should instruct the jury as to that. In any event, I will exercise my discretion and refuse to give it.

We will take a short recess now.

(Thereupon a recess was taken, after which [134] the jury returned to the courtroom and counsel for the respective parties argued the cause to the jury, and thereupon a recess was taken until 2:00 p.m. of the same day, at which time Court reconvened and the Court instructed the jury as follows:) [135]

Court's Instructions to the Jury

The Court: Members of the jury, you have now heard all the evidence and the arguments of counsel in this case, which is now entitled Mary Edith

Daulton, Administratrix of the Estate of Donald LeRoy Daulton, Deceased, Plaintiff, vs. Southern Pacific Company, a corporation, Defendant. The case was formerly entitled in the name of Agnes B. Thompson as Administratrix, Plaintiff, but that has been changed by agreement of counsel and makes no difference in the determination of the case.

You have the duty and the responsibility of determining the issues of fact which are left in the case, and your determination upon the issues of fact are final and binding. I called your attention to the fact heretofore that you were acting in a judicial capacity and that you really are the judges in the determination of this case.

Now judges are required to decide cases according to the law and the facts. The facts are found in the testimony and the other evidence which you have had presented to you here in court, but in view of the fact that you are not educated as to rules of law the judge is required to state those rules to you.

The Court is going to review the facts for you to [136] settle. It is true that a judge of this Court has a right to indicate how he feels upon a question of fact, and you might attach some importance to that if it were done. But as far as this Court is concerned, this is purely a question which the Court feels you are absolutely competent to decide as to the facts; you are just as competent as the judge to decide them, and I intend to leave to you the determination of the facts. On the other hand, it

is the function of the Court to state the rules of law to you, and so far as the rules of law are concerned they are binding upon the Judge as well as they are upon you, and they are binding on you whether you like them or not. Those are the rules which we must follow. I am not saying that you would disagree with them, because, after all, most rules of law are the outcome of experience with particular situations. But in this case you have some statutes enacted by Congress which are binding upon all of us, as I say, in the determination of these cases.

Now counsel have made arguments before you. You must remember that counsel are advocates. One is employed by the plaintiff and the other is employed by the defendant. Of course, they want to win the case, and they look at things from a partisan angle. We as judges should be impartial, and I want you to remember that that is my attitude in this case. I don't want anything except a fair and impartial determination [137] of the case under the law and the evidence. If you think that I have indicated one way or another any feeling by rulings that I may have made, I advise you now that that is absolutely incorrect. I have not intended to convey to you any idea as to how you should determine the questions of fact, of which you are the final judges.

Now this situation is very well outlined, but I will read you some of these things again which are agreed to by everybody. It is agreed by everybody in this case, and you will accept this as a fact as

far as it goes, that on or about the 6th day of October, 1952, at or near the hour of 3:00 o'clock p.m. thereof, one Donald LeRoy Daulton was employed by defendant as a brakeman working on defendant's eastbound work train, which was moving in an easterly direction on the defendant Southern Pacific's right-of-way and in the vicinity of Wocus, Klamath County, Oregon. At that time Donald LeRoy Daulton and Southern Pacific were engaged in interstate commerce. That is what gives this Court jurisdiction and the right to try this case and why these statutes which I will call to your attention are applicable.

At that time and place it is agreed Donald LeRoy Daulton received injuries which resulted in his immediate death. Also, there are some statements about citizenship which I don't intend to read you, because that likewise has something to do with the question of the right of the Court [138] to try the case.

The plaintiff in this case has a right to bring it as Administratrix of Donald LeRoy Daulton, and no question is raised about that. She has been appointed Administratrix by the State Court.

Now I will read you what the Administratrix contends. This is something, of course, that is incumbent upon her to prove. There are some portions of this which I will call your attention to later. The plaintiff, the Administratrix, contends that on the date mentioned Daulton was standing on the lead footboard of an engine of Southern Pacific when the footboard was improper and unsafe

in that the footboard was so improperly fastened to the steel braces supporting it that the head of a bolt was caused to and did protrude above the surface of the footboard, by reason of which Daulton was caused to fall from the footboard and to receive fatal injuries.

Also, the Administratrix contends that at the same time and place, while Daulton was acting in the course and scope of his duties, the defendant Southern Pacific was careless and negligent in the following respects: That the bolts on the footboard where he was standing were not properly countersunk; that the footboard was unsafe in violation of the Boiler Inspection Act, which I will call your attention to; that Daulton was allowed to ride on the footboard of the [139] engine; that the train was not stopped immediately in accordance with custom and practice when Daulton went out of vision of the other members of the train crew; that the engineer was operating the train and controlling the movements of the train without signals from the train crew; that the engineer was relying upon signals for the movement of his train from the conductor or the rear trainman, whereas the movement of the train should have been controlled by signals from Daulton or the head brakeman; and that by reason of this alleged negligence it is claimed the injuries resulting in his death were received.

Now, the company rules in regard to this have been introduced in evidence, and although certain rules are here specified I think you have a right to consider all the rules which are on the sheet of

paper, Exhibit E, which you will have in your hands in the jury room. The contention of the plaintiff Administratrix is that Rule M, 7-B and 108 are controlling. Likewise, the Administratrix contends that at the time of Daulton's death he left surviving him his widow, Mary Edith Daulton, and two minor children, Gary Wayne Daulton, aged six years, and Virginia Daulton, four years, who were dependent upon him for their maintenance and support.

There is a further contention that at the time of his death Daulton was a well and able-bodied man of the age of 33 years and was earning and receiving from his employment [140] with the Southern Pacific the sum of $575 per month. Now, the facts relating to that are in evidence. There is no question that he was a well and able-bodied man and was of the age of 33 years, and the amounts that he was receiving from the railroad company are in evidence. I think there is a period of ten months involved.

Now there is a division in this which I will call your attention to. The first question which you will have to determine from the facts and under the law as I give you is this: Was the Southern Pacific's engine improper or unsafe in any of the particulars charged and, if so, was such a proximate cause of the death of Daulton. That is the first question.

The second: Was the defendant Southern Pacific guilty of negligence in any particular as charged

and, if so, was such a proximate cause of the death of Daulton.

Then after you determine the question of liability —and you must remember that you must determine liability before you reach any other questions on either of those bases—then you would have to assess the damages, if you found that the defendant Southern Pacific was liable because of anything that has been charged in the contentions of the plaintiff.

Now we start with the proposition that this is not fully explained in any respect as to just exactly how this happened, how this fatal injury came about. From that viewpoint, if you didn't know anything more than that, obviously [141] there could not be any recovery here because there can be a recovery only on the ground of some fault, something that the Southern Pacific or its employes should have done that they didn't do. So if we start with that point, if you find that it was an accident, pure and simple, and that neither Daulton, the deceased, nor the employes of the railroad were negligent, and that the engine was properly maintained, there then could not be any recovery. There must be a finding someplace of some fault, because the Southern Pacific would not be liable because the death occurred on its premises or as a result of something that happened on its premises. The Southern Pacific is not an insurer of its employes. That is, you cannot simply say because of the death, no matter who is dependent upon Daulton, that that is something the Southern Pacific must pay for.

Likewise, Daulton was responsible for his own actions, and if the death was a result of his own actions, without the direction of anyone or without the compulsion of some rule or direction of the superior employes, and he was acting voluntarily under the circumstances, and as a result of his own fault, which was not necessarily a part of his duties, if he fell from the train in that way and the railroad was not guilty of having an engine which was in improper condition or if it was not guilty of any of the other acts which are charged or omissions which are charged, then, of course, [142] his Administratrix could not recover.

Therefore, we start with the proposition that it is necessary for the plaintiff to prove by a preponderance of the evidence that there was something wrong with what the railroad did in the particulars alleged; namely, that there was a violation of the Act, or there was negligence of its employes in some other particular, because, of course, the railroad, the Southern Pacific, acts only through its employes, and of course their actions or omissions are chargeable to it. But the plaintiff must prove, in order to have a basis to establish liability, that some of these contentions are established by a preponderance of the evidence.

Now it is not necessary that there be proof amounting to demonstration or beyond a reasonable doubt, but simply by the greater weight of the evidence, the evidence as a whole.

Furthermore, even though the decedent Daulton was acting on his own, you must remember that,

being engaged in the performance of his duty, there is a presumption that he was exercising due care for his own safety at the time of his death, because there is no presumption that he was acting negligently. Also, you must remember that that applies to the employes of Southern Pacific; that there is a presumption that they were acting properly and exercising due care at the time that the accident happened, unless the plaintiff has proved [143] to the contrary.

By a preponderance of the evidence is meant such evidence as when weighed with that opposed to it has more convincing force, and from which the result is that the preponderance is in favor of the party on whom the burden rests.

Now this situation, as I said before, is divided into two parts, and the parts are indicated by the issues which the parties have agreed upon:

Was defendant's engine improper or unsafe in any of the particulars charged and, if so, was that a proximate cause of the death of the deceased? You remember the deceased is Daulton.

In that respect there is an enactment by Congress which provides that a locomotive, and all parts and appurtenances thereof, must be in proper condition and safe to operate in the service to which the same are put. That of course includes the footboard. And, furthermore, that the engine and all its parts and appurtenances, including the footboard, may be employed in active service of the Southern Pacific without unnecessary peril to life or limb.

Now, liability for failure to obey the above sec-

tion is absolute, regardless of negligence on the part of the railroad company or contributory negligence on the part of the decedent Daulton. If you find there was a violation of this [144] Act which contributed proximately to the cause of death of Donald L. Daulton, then you could find that there was a matter for your consideration which would establish liability on that ground alone, because it is the absolute duty under that section to keep the locomotive and its parts and appurtenances, including the footboard, in proper condition, and if they were not in such condition then you might find liability upon the part of the railroad company, irrespective of whether you found that the railroad, Southern Pacific, exercised ordinary and reasonable care with regard to this, because this does not fall within the doctrine of reasonable care; this is simply on the question of absolute liability.

Now, in the first place, you must find as a fact such condition, and here the contention is that the unsafe condition was caused by the protuberance of a bolt on the footboard. There is a conflict in the evidence there. There is evidence from which you might conclude that the bolt was not there and did not protrude at the time of the accident; that there was an entirely different footboard on there. On the other hand, there is some evidence from which you might conclude that the bolt was there in the condition that you saw in some of the pictures introduced by plaintiff, and that it did protrude at the time of the accident. One of the things you have to determine, then, is what was the con-

dition of the footboard at the time of the accident. That is a pure question [145] of fact on which the Court certainly indicates no opinion. You heard the evidence about it, and you can make up your minds about that.

In the next place, in order to establish liability you would have to find that that rendered the engine or part of the engine unsafe. Again, that is a question of fact, because it has to be in violation of this section, which says in order to establish liability it is a question whether it was in proper condition and safe to operate in the service in which the same was put, or that it could be employed without unnecessary peril to life or limb. Those are the questions of fact upon that feature of it.

Once it is established in the first place that it existed, and, in the second place, that it violated these sections of the statute that I just read to you, or clauses of the statute that I just read to you, then absolute liability would be established for that purpose.

That carries over into the field of negligence, which I will discuss next. In the field of negligence, if they violated the statute, that also would establish negligence upon the part of the railroad company. But, as I say, there are two questions of fact for you first to determine. Then even though you find that negligence or this liability is established, you still have to find, before there can be any recovery, that the particular defect, if you find there was [146] one, was a proximate contributing cause to the death of Daulton. So you see there is

another question of fact that you would have to determine on that score.

Now, in order that I shall not forget, I want to say at this time that if you find that condition did exist and that it was a contributing cause to the death, then the Act provides that there should be no consideration given to contributory negligence of Daulton under those circumstances. Even if you found he was contributorily negligent, that would not be a defense if you have made these other determinations and have found that the situation did exist, that it was a contributing proximate cause to the death, and that death resulted in part from that.

Now, I will turn to the other phase of the thing: Was the defendant Southern Pacific guilty of negligence in any of the particulars as charged and, if so, was such a proximate cause of the death of the deceased?

You will remember that the particulars are these: That Southern Pacific was careless and negligent in the following respects: That the bolts in the footboard where Daulton was standing were not properly countersunk; that the footboard was unsafe, in violation of the Act which I just read to you; that Daulton was allowed to ride on the footboard of the engine; that the train was not stopped immediately in accordance with the custom and practice when the deceased went out of the [147] vision of the other members of the train crew; that the engineer was operating the train and controlling the movements of the train without signals from the

train crew; that the engineer was relying upon signals for the movement of his train from the conductor or rear trainman, whereas the movement of the train should have been controlled by signals from the deceased Daulton or the head brakeman.

Now the statute, of course, permits this action to be maintained under these circumstances for negligence where negligence is claimed. And, as I said before, the entire footboard matter in this case must be proven by plaintiff by a preponderance of the evidence.

Negligence is the omission to do something which an ordinary, reasonable and prudent person would have done under the same circumstances, or the doing of something which an ordinary, reasonable and prudent person would not have done under the same circumstances at the time and place. You must also consider the time, place and circumstances in determining whether an action or an omission is negligent. The rule is what an ordinary and prudent person would have done, exercising ordinary care, under the circumstances. By "ordinary care" we mean that degree of care which an ordinary, careful and prudent person would have exercised under the same circumstances, and the failure upon the part of any person to exercise that degree of care constitutes [148] negligence.

Now it has been admitted, of course, that this injury and death occurred under these circumstances, so now we have to consider, besides the matters which I have given you with regard to the footboard and in connection with that under this

charge of negligence, also whether or not the employes of the railroad under these circumstances—that is, the engineer, the rear brakeman, and all the other employes of this railroad present at the time and place—were guilty of negligence in any of the particulars alleged here. That, of course, is a question of fact. You have heard about it, and you know just what the engineer did.

I will say in this regard that the rules have been introduced here. The rules do not specifically cover this situation. None of the rules specifically cover this exact situation, but that does not relieve the railroad of the duty of exercising ordinary care such as a reasonable and prudent person would have exercised under the circumstances. You have to consider these employes and what they did and determine whether or not the plaintiff has proved by a preponderance of the evidence that they were negligent in any of these particulars.

The next thing you have to find is, if there was negligence, that it contributed proximately to the death of the deceased Daulton. If you find the defendant was guilty [149] of any negligence as contended by the Administratrix, and that this negligence proximately contributed to the death of Donald L. Daulton, deceased, then you could find liability.

You must remember in regard to this that no employe such as Daulton is held to have assumed the risks of his employment in any case where the death resulted in whole or in part from the negligence of any of the employes of Southern Pacific. The plain-

tiff need not prove, in order to recover, that the negligence of the defendant or its servants, if you find there was any, was the sole proximate cause of the death of Daulton. The railroad is liable for the death, even though its negligence, if any, was only a contributing proximate cause. But where the railroad has committed no negligent act or its employes have committed no act that constitutes any part of the causation, the defendant would then be free from liability. In other words, if you should find a situation where you could say that Daulton by his own act, independent of any other circumstances, caused his own death, then of course the railroad would not be liable for that.

After you are through with these various phases and you make these determinations of fact, if you have found that the railroad is liable under the law, then you get down to a consideration of what damages should be allowed. In order that you may have the situation before you to determine that question, if you arrive at it, I must instruct you upon [150] that, too. But the mere fact that I give you instructions on damages does not mean that I am trying to decide the first questions of fact which I have already submitted to you. That is for you.

If you do arrive at the point where you find the railroad liable, then you may consider the question of damages, and I will give you the rules in that regard. You are to consider as a measure of recovery, if you find the railroad liable, only such sum of money as will compensate the plaintiff Administratrix for the pecuniary loss suffered by the bene-

ficiaries of Daulton, and the Administratrix is not to be enriched nor is the defendant to be punished in the imposition of damages, because damages are based upon the theory of compensation; not upon apparent need or the ability of Southern Pacific to pay.

By pecuniary loss is meant either a loss arising from the deprivation of something to which the beneficiaries of Daulton would have been legally entitled if he had lived, or a loss arising from a deprivation of benefits which from all the circumstances it can be believed with reasonable certainty the beneficiaries would have received from Daulton had his life not been taken. Such damages should, of course, be calculated in reference to the reasonable expectation of life of Daulton and of his earning power.

Now, there has been a life and mortality table received [151] in evidence, and likewise certain computations were permitted in evidence as if the actuary had been called to testify to them. These are not binding upon you, but are only given to you as guides whereby you might arrive at a proper measure of damages which will fit in with the instructions in that regard.

In determining the value of the contributions which Daulton might have made to his dependents had he lived, the measure of such recovery is the present-day cash value of future benefits, the pecuniary interest that the widow might have obtained during Daulton's life, and likewise the reasonable expectation of his children, as to what he might

have contributed to them during the period especially of their minority, but without limitation in that regard. You may include in your consideration in regard to the children the loss of nurture, instruction, training and care of which such children, in your opinion, have been deprived.

Now, I am sure that this jury do not need any instructions as to some of the matters which I am going to just mention. In other words, do not arrive at a quotient verdict, because I would have to set that aside. That would be illegal. That is, do not arrive at a verdict by any mathematical formula, by taking a poll of the jury, what each thinks, and then adding them up and arriving at some mathematical computation. That is not the way you are to get at this [152] thing. The way for you to do is for each of you to make up his own mind, when you come to the question of damages, what you think should be given and then argue it out among the others. You have to finally convince every member of the jury that a certain sum is correct according to the instructions and your judgment in the matter. In other words, don't follow any short-cuts in arriving at a verdict. Just argue it out among yourselves and try to arrive at a proper result.

Of course, likewise, I don't need to say that you are not to consider what might be given under State law or some other law of compensation under certain circumstances to these people, or anything of the sort. You are to determine this strictly upon the question of whether or not there is liability

under the instructions I have given you and then turn to the question of damages, and on the question of damages follow the rules that I have given you. Of course, that cuts out of your consideration any possibility of some other statute or some other jurisdiction or some other law under which compensation might be given to them. I don't want to bring your attention to what those might be. This is tried in a very narrow channel, and these instructions that I give you show you what the limits are and what you are governed by, first on the question of liability and then on the question of damages. [153]

Also, you know well enough that you are not to be affected by sympathy for these people. Unquestionably sympathy is due them, but in trying to solve these questions of fact which come up you should not resolve it on that basis; not on the basis of sympathy but on the facts.

There is one factor that I have mentioned in regard to this. That is the factor of contributory negligence. Contributory negligence is not a defense in this case at all. As you will remember from what I said in the first part of the instructions, contributory negligence will not be considered at all if you find that there was a violation of the statute with reference to the condition of the engine or the footboard. If you find that, you won't consider contributory negligence at all, if you find that that was a proximate cause of the death. On the other hand, if you find simply that there was a negligent condition, and that the railroad was guilty of negligence in some of the particulars in evidence, and that was

a proximate cause, then in that regard you have a right to consider the conduct also of the decedent Daulton. If you find that he was contributorily negligent to a certain extent, then you can consider that in setting up the measure of damages.

Now I have given you the measure of damages for the full amount. Now I am taking up a consideration of damages based upon this determination alone with regard to the negligence [154] of the railroad and proximate cause, and if you also find that Daulton was contributorily negligent then you would not award the full amount to the Administratrix, but you would cut it down in accordance with the principles that I am about to announce to you.

It is your duty as jurors to determine how much Daulton's lack of care contributed to the cause of the accident. If Daulton's negligence caused his death to the extent of one-third thereof, then the Administratrix' damages, if any, should be reduced by one-third. If Daulton's negligence contributed to his death to the extent of one-half, then the Administratrix' damage should be reduced by one-half. If Daulton's negligence contributed to his death to the extent of three-fourths, then the Administratrix' damages should be reduced by three-fourths. So, in the first place, you determine the whole thing, as if the negligence, if you find any, was the sole proximate cause of the death and not contributed to by Daulton at all. Then if Daulton was found to be contributorily negligent, you will reduce it according to the formula that I have just given you.

But you must remember that if Daulton was solely at fault, and no negligence on the part of the railroad contributed to his death, then you would not permit any recovery at all and you would not arrive at any consideration of damages. [155]

Now you are the sole and exclusive judges of the facts and of the weight and sufficiency of the evidence. You are not bound to decide in accordance with the testimony of any number of witnesses which does not produce conviction in your minds as against a less number. The direct evidence of one witness who is entitled to full credit and belief is sufficient to establish or prove any fact in this case if you extend credit to him. In other words, you are the sole judges of the credibility of all these witnesses. You have the power to determine in your own minds how much of the truth they are telling and if they are influenced by any exterior motivations. Also, you have a right to consider the opportunities they had for observation. All of these things lend themselves to a consideration of the questions of fact which are before you.

If you find that any witness has testified falsely in any one material part of his testimony, you have a right to consider that in determining what credit you should give him in other respects. If you find that any witness has testified willfully falsely with regard to any factor in this case, then you have a right to entirely disregard his testimony if it has not been corroborated by other evidence which you do believe. But, as I have said before, you are the sole and exclusive judges of the facts and of the

credibility of all witnesses, and your power of judging is [156] supreme in that regard and you are responsible for it.

It is with entire confidence that I submit this question to you, Ladies and Gentlemen, but at this time, before I finally submit it, the rules which I am governed by direct that I give counsel an opportunity to raise questions of law, so I will now excuse you for a few minutes and then I will bring you back and submit the case to you for determination.

(Thereupon the jury retired from the courtroom in custody of the Bailiff, and thereafter the following occurred out of the presence and hearing of the jury:)

The Court: Any exceptions, Gentlemen?

Mr. Brobst: There is only one, your Honor. That was the question of the instruction on contributory negligence. I believe under the circumstances, where the law conclusively presumes that the plaintiff was in the exercise of ordinary care, there being no evidence in the record to the contrary or that he did any act that could be construed as an act of contributory negligence, the instruction should not have been given.

The Court: I don't know what the jury is going to find about that. If I went into the question of negligence on either side and had not gone into that, I would think I was not following the rule that is laid down for me. I think [157] that applies to contributory negligence just as much as it does to negligence. The Supreme Court, as I understand it,

has said these are jury questions, and I am going to submit both of them.

Mr. Brobst: I just read one case the other day where that instruction was given, and the Court said it should not have been given because there was no actual eye-witness to the accident, and in view of those facts it was conclusively presumed that he was in the exercise of ordinary care.

The Court: I think it is conclusively presumed, also, that the employes of the railroad are in the exercise of ordinary care. I won't give it, anyhow. I think these are jury questions; and if you are going to submit one side, you have to submit the other.

Mr. Gearin: If the Court please, the defendant objects to the Court submitting to the jury the issue of fact with regard to an alleged violation of the Boiler Inspection Act on the ground and for the reason that there is no evidence that the locomotive was defective in any particular or in violation of the Act, or that such violation, if it existed, constituted a proximate contributing cause of the death of the deceased.

The Court: I think that is another one. Is everybody satisfied?

Mr. Gearin: With that exception, yes. [158]

Mr. Brobst: I would like my exception.

The Court: Oh, yes, surely. Recall the jury.

(Thereupon the jury returned to the court-room and the following further proceedings were had:)

The Court: Members of the jury, the Court is

about to submit this case to you on the evidence which is before you and the instructions which the Court has now given you. In the event that you find the plaintiff is entitled to recover under the evidence and the instructions, then you will use this form of verdict, which, omitting the formal portions, reads as follows: "We, the jury in the above-entitled action, find in favor of the plaintiff and against the defendant Southern Pacific Company and assess damages in the sum of blank dollars. Dated this blank day of August, 1955." Then there is a blank line, "Foreman."

If you use that form of verdict, of course, you will have found liability under the instructions, and you will also follow the instructions with regard to the amount that you assess as damages and take into consideration all the instructions given on that point.

Upon the other hand, if you find that the defendant was not liable, you will use this form of verdict: "We, the jury duly empaneled and sworn to try the above-entitled cause, do find our verdict in favor of the defendant and [159] against the plaintiff. Dated this blank day of blank, 1955," and a blank line, "Foreman."

Since this case is tried in the Federal Court, Ladies and Gentlemen, you will find it necessary to arrive at a unanimous verdict. In other words, a verdict to all parts of which all of you agree. Be very careful about that, because when you come back here you probably will be asked whether you agree to the verdict or not. So if a verdict were

returned without the unanimous concurrence, it might create a difficult situation. Therefore, carefully check up to see before you return any verdict at all that you are all in agreement with the verdict.

The verdict will be signed, however, by the foreman alone. This is not like a case in the State Court, where less than the full number can agree on a verdict. In this court it is necessary that all the jurors agree to every factor involved in the finding of a verdict.

You will have with you in your jury room the exhibits which have been introduced in the case and these two forms of verdict, which you will use in the determination of the facts in the case.

If there is nothing further, I will now excuse you in order to deliberate on a verdict.

Swear the Bailiff.

(The Bailiff was thereupon sworn, and [160] the jury retired to consider of its verdict.)

[Endorsed]: Filed December 19, 1955.

[Endorsed]: No. 14924. United States Court of Appeals for the Ninth Circuit. Mary Edith Daulton, Administratrix of the Estate of Donald LeRoy Daulton, deceased, Appellant, vs. Southern Pacific Company, a corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Oregon.

Filed: December 14, 1955.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14924

MARY EDITH DAULTON, Administratrix of the Estate of Donald LeRoy Daulton, deceased,
Appellant,

vs.

SOUTHERN PACIFIC COMPANY, a corporation,
Respondent.

STATEMENT OF POINTS

Appellant relies upon the following points for a reversal of the judgment herein.

(a) That defendant failed to disclose at the pretrial the defense that the pictures plaintiff intended to use at the trial were not pictures of the footboard involved in the accident.

(b) That the Trial Court was in error in limiting argument of counsel for plaintiff.

(c) That the Trial Court was in error in instructing with reference to negligence and contributory negligence upon the part of the deceased, there being no evidence upon which to base such instructions.

(d) Prejudicial comment of the Trial Judge with reference to one of plaintiff's expert witnesses.

(e) Failure of the Trial Judge to properly explain the Federal Employers' Liability Act.

HILDEBRAND, BILLS & McLEOD

/s/ By D. W. BROBST,

Attorneys for Appellant

Affidavit of Service by Mail attached.

[Endorsed]: Filed January 12, 1956. Paul P. O'Brien, Clerk.

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JOHN T. FEY, Cl

In the

Supreme Court of the United States

OCTOBER TERM, 1956

No. 691

MARY EDITH DAULTON, Administratrix of the Estate of Donald LeRoy Daulton, Deceased,
Petitioner,

vs.

SOUTHERN PACIFIC COMPANY, a corporation,
Respondent.

Brief of Respondent Southern Pacific Company In Opposition To Petition for Writ of Certiorari

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. .....

MARY EDITH DAULTON, Administratrix of the Estate of Donald LeRoy Daulton, Deceased, *Petitioner,*

vs.

SOUTHERN PACIFIC COMPANY, a corporation, *Respondent.*

Brief of Respondent Southern Pacific Company In Opposition To Petition for Writ of Certiorari

The sole question presented by the Petition is whether the petitioner was afforded a fair trial within the intent of the Fifth Amendment to the Constitution of the United States.

The rulings and conduct of the Trial Judge did not deprive petitioner of a fair trial nor in any other way prejudice her cause of action.

REPLY TO "QUESTIONS PRESENTED" FOR REVIEW AND "STATEMENT OF THE CASE"

We cannot accept petitioner's statement of the "Questions Presented" or "Statement" set forth in the petition. In reality these questions are presented:

1. Did the Trial Judge prevent the plaintiff from having a fair trial, and violate the "due process" provision of the Fifth Amendment to the United States Constitution, when he advised counsel for petitioner not to, in argument to the jury, refer to the instructions that would be given by the Court nor to argue the law to the jury.

2. Does a Trial Judge violate the provisions of the Fifth Amendment to the Constitution when he comments to the jury on the qualifications of one witness to testify to matters of expert knowledge on a point over which there was no dispute between the parties and other uncontradicted expert testimony on the precise question was received?

3. Does a plaintiff have a fair trial and the full benefit of the "due process" provision of the Fifth Amendment to the Constitution of the United States when her counsel consents to the giving of an instruction of which complaint is now made?

4. Did these rulings of the Trial Judge deprive the plaintiff of her right to have her case and cause fully and effectively presented by counsel, in violation of the "due process" provision of the Fifth Amendment of the United States Constitution?

For the purposes of this brief we adopt and set out the statement of the case as appears in the opinion of the Court of Appeals dated October 15, 1956, Chambers, Circuit Judge:

> "Donald LeRoy Dalton, a Southern Pacific brakeman of the Shasta division of the company, was killed on October 6, 1952, in the course of his employment near the Wocus siding, which is located about three miles from Klamath Falls, Oregon.
>
> In the moments immediately preceding his death he was acting as the 'head' or 'front end' brakeman on a five car work train. The train was moving northerly on a main line track to get on a siding and out of the way of two freight trains that were scheduled to pass each other at Wocus.
>
> As the train moved slowly forward at perhaps four miles an hour Daulton was standing on the right hand footboard (engineer's side). Before entering the siding, the train was to stop for Daulton to manually throw the switch to permit entry into siding.
>
> Obviously, from the testimony of various trainmen, it would have been better practice for Daulton to have ridden in the cab of the engine, but on the other hand, he may have been riding the footboard to watch for tools possibly left on the track by workers and to warn the workers, as he saw

them, about the other trains which would be along soon.

There were no eye witnesses. No one knows positively what caused Daulton to fall off the footboard and to be dragged between the rails and killed. It is not suggested that it was due to a sudden lurch forward or a quick stop of the engine. As the train moved forward Daulton was at first visible to the engineer. Then he did not observe Daulton out on the footboard for a distance of 'about 40 car lengths' or about 1,400 feet. Being almost at the juncture to the sidetrack, and seeing the switch for the sidetrack receiving no attention and that the block signal near the switch had not changed over, the engineer stopped the train. Now, at this point, all of the train crew knew something was wrong. The testimony indicates the train probably could have been stopped within ten feet. It is not clear whether the engineer lost sight of Daulton because he, the engineer, was primarily watching a signal or because Daulton was no longer on the footboard to be seen, but somewhere under the engine or tender. At least for much of the way, the jury could have found that Daulton could not have been seen on the footboard — because he wasn't there."

REPLY TO "REASONS FOR ALLOWANCE OF WRIT"

1. PLAINTIFF DID NOT HAVE A RIGHT TO ARGUE THE LAW OR INSTRUCT THE JURY AS TO THE LAW THROUGH ARGUMENT OF HER COUNSEL.

Petitioner has gone beyond the plain intent of the Trial Judge's language in advising counsel for plain-

tiff that he could not refer to what the Court's instructions would be or to argue the law. Petitioner pretends that she was thus deprived of her right to present her theory of the case. Such was not the result. Although the scope of permissible argument varies from one jurisdiction to another, no case cited by petitioner stands for the proposition that limitations of argument imposed by the Trial Court in the present case raise any constitutional question of "due process". The cases set forth below establish the right of a trial court to so control argument.

In *Mason vs. Allen, et al*, 183 Ore. 638, 195 Pac. 2d. 717, the Court said (at 644):

> "The practice of reading law to the jury by counsel—either from a book or a manuscript—is not one to be encouraged. *Lang vs. Camden Iron Works*, 77 Or. 137, 146 P. 964. It must be conceded, however, that the law is the major premise of every jury argument and it is not always possible to keep the premise inarticulate. It is difficult to see how a lawyer could argue a criminal case to a jury without referring to the rules of presumption of innocence and reasonable doubt, or how, in arguing a negligence case such as this, a lawyer could refrain from mentioning the conduct of a reasonably prudent person. *But aside from reference to such elementary rules about which there can be no difference of opinion, statements by counsel of their views of the law and predictions as to instructions that will be given by the Court—save where the Court has previously advised counsel on the subject —have no place in the argument. The Trial Judge*

has ample power to control the argument in this regard and should exercise it, for the jury, while exclusive judges of the facts, must look to the Court, not to counsel, for guidance as to the law of the case." (Emphasis supplied)

In the *Glendenning Motor Ways Inc. vs. Anderson, et al,* 213 Fed. 2d. 432 (8th Cir. 1954), the Court said:

"Counsel for plaintiff in the course of a closing argument read to the jury what were stated by him to be applicable statutes of the State of Wisconsin, and he commented thereon giving his views as to their construction and meaning. *The practice, we think, is reprehensible and should not be tolerated. It is the function and duty of the Trial Court to instruct the jury as to the law and it is the duty of the jury to accept as the applicable law that given by the Court and no other. It is the duty and provisions of the jury to find and determine the facts, not the law.* (Citing cases)." (Emphasis supplied)

In *Makino vs. Spokane P. & S. Ry. Co.,* 155 Ore. 317, 63 Pac. 2d. 1082 (at 336), which case was cited by petitioner, the Court said:

"Although an attorney in his argument to the jury may state the principles of law applicable to the action so far as is *necessary to enable him to discuss the evidence intelligently*, subject, of course, to being corrected by the Presiding Judge, he should not be permitted to read from law books."

In *Heard vs. Farmers Bank of Hardy*, 174 Ark. 194, 295 S.W. 38, the Court said (at 42):

> "It is also contended by the appellant that the Court erred in not permitting the defendant's attorney in his opening statement to state the contents of part of Section 704 of Crawford & Moses' Digest, and erred in not permitting defendant to prove this statute or part of this statute to the jury. The Circuit Court was correct in holding that this was not proper to be proved in evidence, but that that was a question of law to be given to the jury as an instruction from the Court."

In *Ragsdale vs. Ragsdale*, 142 Tex. 476, 179 S.W. 2d. 291 (at 293, 294) the Court said:

> "We say in passing, however, that in our judgment it is always safer, more prudent, and perhaps as effective, for counsel for the successful party to limit themselves in their arguments strictly to the evidence, *the law as given only in the Court's charge*, and arguments of opposing counsel * * *." (Emphasis supplied)

In *Consto vs. Railway Express Co.*, 219 S.W. 2d. 276 (Mo. 1949), (at 281) the Court said:

> "The prerogative of instructing the jury belongs to the Court and *neither party is entitled to instruct the jury through the argument of its counsel on a subject which should be covered by instructions of the Court*. We think it clear that defendant's counsel was attempting to present to the jury in argument a matter which should have been covered by an instruction, if he was entitled to it."

In *Daniel Lumber Co. vs. Settlemire*, 256 S.W. 2d. 922 (Tex. Civ. App. 1953) (at 927), the Court said:

> "It is the duty of the Trial Judge to inform the jury as to the law of the State. *Argument of counsel should be directed to the facts and the law as given only in the Court's charge* (Citations). We think the Trial Court was correct in sustaining the objections to the proposed argument * * *."

In this case defendant's attorney desired to argue the State law. Objection was sustained. There was no objection to counsel telling the jury what the defendant's duty was as he saw it, but there was objection to counsel saying what the law provided. Counsel for plaintiff made further objection as to any argument counsel for appellants proposed to make by which he meant to tell the jury his view of the law in regard to any issue in the case other than the law that might be contained in the Court's charge.

In *Pallas vs. Crowley-Millner & Co.*, 334 Mich. 282, 54 N.W. (2d), 595, counsel attempted in opening statement to tell the jury what the Court's instructions would be, and next what the law was. Defendant's counsel insisted that argument be limited to a statement of what counsel claimed the law to be. The Trial Court ruled accordingly. The Court said (at 596):

> "The effect of the Court's ruling was not contrary to the cited case *inasmuch as it did not deprive plaintiff's attorney of the right to state his claim of the law in his opening statement.*"

In *Barfield vs. Damon*, 56 N. M. 515, 245 Pac. 2d. 1032, the Trial Court permitted counsel, over objection, to argue to the jury the law respecting a former tenant not a party to the action. The Court held that this was error and said (at 1038):

> "Of course, it is the prerogative of the Court to instruct the jury and the *parties may not instruct the jury through arguments of counsel on a subject which should be covered by an instruction of* the *Court.*" (Emphasis added)

The above cases establish that a plaintiff has no right to predict instructions of the Court or even to discuss those given by the Court. Certainly a plaintiff has no right to argue what the law is or should be. The exercise of these so-called rights can only lead to confusion of the jury and encourage them to disregard the instructions given by the Court.

The Trial Judge, having broad powers of discretion and charged with the duty of instructing the jury as to the law, may, certainly, control the argument of counsel so that the jury may best be apprised of the

law applicable to the facts of the case. The Court of Appeals correctly pointed out that it "did not appear that the plaintiff was required to argue in a vacuum."

Although we submit that no error was committed by the Trial Court, if the Court did err, then such error does not call for a reversal of the judgment. The Trial Judge properly instructed the jury on the law. *No objection was made to these instructions by petitioner except the instructions relating to contributory negligence which are not in issue in this petition.*

2. THE TRIAL COURT'S COMMENTS ON THE QUALIFICATIONS OF PLAINTIFF'S PROFFERED EXPERT WITNESS DID NOT PREJUDICE PETITIONER.

Petitioner argues that the Trial Court's advice to the jury that witness Zimmerman had shown no particular qualifications to testify as to the distance within which a particular train could stop could not possibly have prejudiced petitioner, as this narrow point was not disputed or otherwise in issue. The Trial Court left to the jury the question of the witness's qualifications and did not seek to direct them by instruction of the Court. After witness Zimmerman had testified that the train could have been stopped "within a few feet, or almost immediately" (P.R. 78), witness Wil-

liams testified that the train could have been stopped "in between four to six feet" (P.R. 83), and witness Warmack testified "six to eight feet" (P.R. 97). Previous to this testimony witness Biwer testified that the train could be stopped "Oh, within ten to fifteen feet" (P.R. 51). Under these circumstances witness Zimmerman's testimony was not of the essence of the case, and was at most merely cumulative. It seems clear that had the Trial Court refused the testimony of witness Zimmerman entirely, no reversible error would have appeared inasmuch as there were other more qualified witnesses available at the trial who did in fact testify on this point. As the Court of Appeals said:

> "Had the issue remained hotly contested as to the distance required to stop, then the comment might have to be seriously considered. *But when the case was submitted to the jury, the comment had become of no consequence anyway.*" (Emphasis supplied)

3. THE TRIAL COURT DID NOT PREJUDICE PETITIONER'S CASE BY INFORMING COUNSEL FOR PETITIONER THAT THE INSTRUCTION OF THE COURT ON MEASURE OF DAMAGES WOULD BE THE LOSS OF PECUNIARY BENEFITS REASONABLY TO HAVE BEEN ANTICIPATED, AND THAT NO INSTRUCTION WOULD BE GIVEN QUALIFYING THIS ON THE BASIS OF THE EARNING POWER OF MONEY.

Where the employee is killed the uniform Federal rule which must be followed is that his administrator, suing for the benefit of the next of kin, is entitled to recover such damages "as flow from the deprivation of the pecuniary benefits which the beneficiaries might have reasonably received if the deceased had not died from his injuries."

Michigan Cent. R. Co. vs. Vreeland, 227 U.S. 59, 57 L. Ed. 417 (1912).

What matters may properly qualify this instruction are matters generally for argument of counsel to the jury and not for instruction by the Court. That money has earning power so that money in hand has a greater value than money to be had in the future is such a commonplace fact, of daily consciousness, that it need not be made a matter of judicial fiat. If petitioner believed that some reminder of this was necessary, it clearly was sufficiently emphasizable, for this purpose, in argument to the jury.

See *Louisville & N.R. Co. vs. Botts,* 173 Fed 2d. 164 (8th Cir. 1949), where the Court held that matters relating to life expectancy in hazardous occupations and work expectancy were not proper matters of instruction.

Although it appears that the jury was properly instructed as to measure of damages and that petitioner was not, as she alleges, deprived of her right to properly argue damages, it does not appear that had error on this point been committed petitioner could have been in any way prejudiced. The jury returned a verdict for defendant which necessarily meant that the question of damages was not raised by the jury, which fact is admitted in petitioner's brief (at page 10). How, then, could petitioner have been prejudiced or now claim, that because of the Court's ruling on the intended instruction on measure of damages, to be deprived of due process of law? Petitioner thought so little of the point now raised that *she failed to object to the instruction given and failed to assign this matter as error on appeal to the Court of Appeals.*

The proposed instruction was consented to by both parties the Court saying "I will make it with the consent of the defendant in that regard" (P.R. 153).

Rather than being prejudiced by such an instruction petitioner would have benefited because it did not expressly point out the limit of recovery based upon earning power of money. However, the Trial Court did instruct as follows:

> "In determining the value of the contributions which Daulton might have made to his dependents

had he lived the measure of such recovery is the present-day cash value of future benefits." (P.R. 170)

CONCLUSION

The petition for Writ of Certiorari should be denied because the record clearly shows that plaintiff had a fair trial.

Respectfully submitted,
CLARENCE J. YOUNG,

JOHN GORDON GEARIN
of Counsel